DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-797
Title: T. Felkner, Petitioner
v.
Steven Frank Jackson

Docketed: December 15, 2010
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos: (09-15379)
Decision Date: July 23, 2010
Rehearing Denied: September 3, 2010

---Date---	--------Proceedings and Orders----------
Dec 2 2010	Petition for a writ of certiorari filed. (Response due January 14, 2011)
Dec 2 2010	Appendix of T. Felkner filed.
Jan 13 2011	Brief of respondent Steven Frank Jackson in opposition filed.
Jan 13 2011	Motion for leave to proceed in forma pauperis filed by respondent.
Jan 25 2011	Reply of petitioner T. Felkner filed. (Distributed)
Jan 26 2011	DISTRIBUTED for Conference of February 18, 2011.
Feb 18 2011	Record Requested.
Feb 22 2011	DISTRIBUTED for Conference of February 25, 2011.
Feb 28 2011	DISTRIBUTED for Conference of March 4, 2011.
Feb 28 2011	Record received from U.S. District Court Eastern District of California (one box).
Mar 10 2011	DISTRIBUTED for Conference of March 18, 2011.
Mar 21 2011	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Mar 21 2011	Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

178 (1)

No. 10-797 DEC 2 - 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

T. FELKNER, *Petitioner*,

v.

STEVEN FRANK JACKSON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General
TAMI M. KRENZIN
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-2394
Fax: (916) 324-2960
Tami.Krenzin@doj.ca.gov
Counsel for Petitioner

COPY

QUESTION PRESENTED

In this case, the state prosecutor peremptorily excused two of three African-American jurors on the venire. The defense objected that the prosecutor had discriminated based on race. The judge overruled the objection, crediting the prosecutor's assertion of race-neutral reasons for the strikes as genuine. On direct review, the state appellate court upheld the ruling after undertaking a "comparative analysis" of the struck jurors with non-minority-member jurors whom the prosecutor had declined to challenge. In later federal habeas corpus proceedings, the district judge upheld the state court's decision as reasonable under 28 U.S.C. § 2254(d). But the Ninth Circuit reversed, explaining only that:

> The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors.

The Question Presented is: Did the Ninth Circuit's ruling satisfy the restrictions on habeas corpus relief imposed by Congress in § 2254?

TABLE OF CONTENTS

	Page
Question Presented	1
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	7
I. The Ninth Circuit's decision conflicts with the deferential standards of review this Court and Congress have established for claims under *Batson* and AEDPA	8
II. The Ninth Circuit's misapplication of *Batson* and AEDPA is an important and recurring issue	14
Conclusion	16

TABLE OF AUTHORITIES

Page

CASES

Ali v. *Hickman*
584 F.3d 1174 (9th Cir. 2009) 12, 14
Batson v. *Kentucky*
476 U.S. 79 (1986) ..... passim
Hernandez v. *New York*
500 U.S. 352 (1991) 9, 10
Knowles v. *Mirzayance*
129 S. Ct. 1411 (2009) 9
Miller-El v. *Cockrell*
537 U.S. 322 (2003) 9
Mitleider v. *Hall*
391 F.3d 1039 (9th Cir. 2004) 10
People v. *Wheeler*
22 Cal.3d 258 (1978) 3, 4, 5
Reynoso v. *Hall*
No. 08-15800, 2010 WL 3516410 (9th Cir. Sept. 7, 2010) 15
Rice v. *Collins*
546 U.S. 333 (2006) ..... passim
Rivera v. *Nibco*
No. 09-15136, 2010 WL 1193319 (9th Cir. March 29, 2010) 14
Snyder v. *Louisiana*
552 U.S. 472 (2008) 9
United States v. *Alanis*
265 F.3d 576 (7th Cir. 2001) 10
United States v. *Campbell*
317 F.3d 597 (6th Cir. 2003) 10

TABLE OF AUTHORITIES
(continued)

Page

United States v. *Thompson*
827 F.2d 1254 (9th Cir. 1987) 10

United States v. *Vaccaro*
816 F.2d 443 (9th Cir. 1987) 10

STATUTES

Title 28, United States Code
§ 1254(1) 1
§ 2254 ..... 1, 8, 13
§ 2254(d) 1, 6, 13
§ 2254(d)(2) 9
§ 2254(e)(1) 2, 10

CONSTITUTIONAL PROVISIONS

United States Constitution
Amendment XIV, § 1 1

COURT RULES

Supreme Court Rule
rule 10(a) 15

OPINIONS BELOW

The memorandum opinion of the Ninth Circuit Court of Appeals (App. 1-3) is unreported. The orders and opinions of the United States District Court for the Eastern District of California (App. 4-40), the California Court of Appeal (App. 41-55), and the California Supreme Court (App. 56), are also unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit rendered its decision on July 23, 2010, and denied a timely petition for rehearing and rehearing en banc on September 3, 2010. (App. 57-58.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Equal Protection Clause provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

2. Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. Respondent Jackson was charged in state court with burglary, robbery, sexual battery, forcible oral copulation, and rape against a 72-year-old woman.

2. During jury selection at the trial, potential juror Mr. S, an African-American man, asked to be questioned outside the presence of the other jurors. In the sequestered voir dire, Mr. S said that his niece and nephew had both been molested by their father (his brother-in-law), that his friend had been charged and convicted of rape in a high profile case in Sacramento, and that his father once had been robbed. The prosecutor asked Mr. S about why he apparently had hesitated and bit his lip when defense counsel asked him if he could be fair and impartial. Mr. S replied that he had hesitated because he "[had] a lot of baggage about his niece and nephew." He then spoke about his experiences with people who had been victims and perpetrators of sexual abuse, but claimed that he was "comfortable" sitting as a juror in respondent's case. App. 45.

Reporter's Augmented Transcript (RAT) 22, 33-38, 59.

Later in the voir dire, when asked about possible bad encounters with law enforcement, Mr. S said that, between the time he was sixteen and thirty years old, he was stopped numerous times on account of his race and age, mostly by white police officers, while walking in Fresno and Sacramento. When the prosecutor asked if he reported any of these incidents, Mr. S responded that it "[s]eemed like it would be a waste of time because I would be complaining to the people that I felt I was being harassed by." Still, Mr. S claimed that his negative encounters with law enforcement would not affect his ability to be fair as a juror. The prosecutor, nonetheless, exercised a peremptory challenge, his fifth one, to excuse Mr. S. App. 45-46; RAT 57-58, 98-99, 103.

Still later, the prosecutor exercised his twelfth peremptory challenge to remove Ms. J, an African-American woman, who had stated during voir dire that she knew people who had been arrested for driving under the influence, for insurance fraud, and for mayhem, and that she had attended some of their trials. When the trial judge asked her if there was any reason she could not be fair to both sides, she said "no." Ms. J further noted that she had been to graduate school in 1992 and had completed an internship "at the branch in the psychiatric department." Apparently, Ms. J did this internship in a jail. Further, Ms. J also had reported, on her jury questionnaire, that she held a master's degree in social work. App. 46, 49; Reporter's Transcript (RT) 77-79; RAT 181-82, 188, 200.

The prosecutor challenged Ms. J, and defense counsel objected under *People* v. *Wheeler*, 22 Cal.3d

258, 280 (1978)—a California Supreme Court decision that had anticipated this Court's ruling in *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—that the prosecutor was exercising his peremptory challenges on account of race. The trial judge noted that both jurors, as well as another prospective juror still in the venire, were African-American. Then, without making any finding of a prima facie case of discrimination, the judge asked the prosecutor for his reasons.

The prosecutor explained that he had removed Mr. S because that juror "had a history with law enforcement where for a certain point in his life he felt he was stopped for no reasons. Whether or not he still harbors any animosity is not something I wanted to roll the dice with." The prosecutor reported, further, that he had removed Ms. J because of her educational background. He explained that he did not like to keep social workers on juries, and noted that he did not have any other social workers on the panel. App. 46-47; RT 76-78.

Defense counsel did not take issue with the prosecutor's stated reason for removing Mr. S, but only with his reason for challenging Ms. J. Defense counsel said that he had "let Mr. [S] slide because [he] anticipated the response that would be made." Defense argued only that it was objectionable for the prosecutor to have removed Ms. J based on her educational level, the nature of her degree, or her occupation. App. 47; RT 80.

The trial judge denied the motion as to Ms. J. He explained, "in view of the fact [the prosecutor] has mentioned that social worker degree, which [has] absolutely nothing to do with her race, I am going to deny the *Wheeler* motion." App. 47; RT 80.

In the end, the prosecutor peremptorily excused thirteen jurors, including two of the three African-Americans on the panel. Still, the prosecutor, who never used all of his allotted peremptory challenges, accepted the jury with the third African-American juror in the box. That juror served on respondent's jury. App. 49-50; RT 77; RAT.

3. At the trial, the 72-year-old victim testified, but was unable to identify respondent as her attacker. The prosecution introduced scientific evidence that saliva collected from the victim's breast contained DNA that matched respondent's.

The jury found respondent guilty as charged, and further found that respondent has suffered prior convictions for assaults with a firearm and a deadly weapon. The judge sentenced him to state prison for a term of 310 years to life.

4. The California Court of Appeal affirmed on direct review, rejecting among other claims respondent's argument that the prosecutor had violated *Wheeler* and *Batson* by excusing Mr. S and Ms. J. After finding that the prosecutor's stated reasons for the excusals were race-neutral, and engaging in a "comparative analysis" of Mr. S and Ms. J with non-minority jurors whom the prosecutor had declined to challenge, the California Court of Appeal concluded that respondent had failed to demonstrate purposeful discrimination.

As for Mr. S, respondent sought to compare him with only one other: Juror 8, who had stated that he believed he had been stopped once by an Illinois patrolman and given an $80 ticket because of his California license plates, and who also had been the victim of a car burglary but was disappointed that law enforcement had not done a thorough investigation. The state appellate court concluded

that Juror 8's negative experience out of state and the car burglary were not comparable to Mr. S's fourteen years of perceived harassment by local law enforcement based in part on race. Also, the state court noted that the prosecutor indeed had removed Juror C, who also had a negative experience with local law enforcement but claimed he would be fair. Juror C had stated that a Roseville police officer had assaulted him, that he had filed a civil suit against the officer, and that he had three felony charges pending against him.

As for Ms. J, respondent argued on appeal that when the prosecutor was concerned with the educational or occupational backgrounds of other jurors, he asked them several questions, but not Ms. J. The state court, however, found that Ms. J's educational background in social work—a fact specifically cited by the prosecutor—was not comparable to other jurors' backgrounds in law, biochemistry, or environmental engineering. The state court also considered the fact that the respondent's actual jury indeed included an African-American.

5. Following denial of further review by the California Supreme Court, respondent filed an application for writ of habeas corpus in the federal district court. In a detailed analysis, the district court engaged in comparative analysis of the jurors and came to the same conclusions as the state court of appeal. Applying the deferential-review standard of 28 U.S.C. § 2254(d), the district court found that the state court's decision was not "contrary to" or an "unreasonable application of" clearly established federal law, and was not based on an "unreasonable determination of the facts." The district court noted that the record showed that Juror S had "a lot of baggage" with regard to the molestation of his niece

and nephew, that he had asked to discuss the issue in private, and that he had hesitated and bit his lip when asked if he could be fair and impartial. The district court also commented that, although respondent maintained that the prosecutor should have asked more questions of Ms. J, it was unclear why the prosecutor should have asked further questions when it was her social service background specifically that was unacceptable to him.

6. In an unpublished opinion, the Ninth Circuit reversed the district court's denial of habeas relief and remanded the case. The panel offered only a brief statement:

> The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors.

7. On September 3, 2010, the Ninth Circuit denied panel rehearing and rehearing en banc and on September 29, 2010, stayed its mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

Despite the strong protection AEDPA accords to state court fact-finding, the Ninth Circuit for the scantest of cited reasons, and with no explanation of how the state court's findings could be deemed "unreasonable," overturned the credibility call of the state trial judge even after it had been affirmed by both the state court of appeal and the federal district court. In doing so, the Ninth Circuit nullified a rape

conviction, and in effect has forced a now 80-year-old rape victim to retrial. In addition, the Ninth Circuit's ruling unfairly impugns the prosecutor's motives as racial in nature—despite the obvious support in the record for the prosecutor's race-neutral explanations that were credited as genuine by the trial judge who observed the witness himself.

In doing all this without the requisite compelling reason—and virtually without any explanation at all—the Ninth Circuit failed to carry out its obligation under 28 U.S.C. § 2254 to presume the state court's fact-finding to be correct and to review it merely for objective reasonableness. Indeed, the Ninth Circuit's opinion reflects the opposite of AEDPA deference, which requires the federal habeas court to *accept* the state court's finding of fact if rationally supported in the state-court evidentiary record. Instead, the Ninth Circuit's minimal explanation is indistinguishable from a mode of improper de novo review that would perversely *reject* a state court's finding of fact if there is any basis for the federal court to merely disagree with it.

This Court should grant plenary review, and would be justified in summarily reversing, because the Ninth Circuit's decision conflicts with this Court's precedent governing the deference afforded to state courts under both *Batson* and AEDPA.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DEFERENTIAL STANDARDS OF REVIEW THIS COURT AND CONGRESS HAVE ESTABLISHED FOR CLAIMS UNDER *BATSON* AND AEDPA

The ultimate question under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), is essentially a

credibility determination of whether the party's peremptory challenge was exercised on the basis of the impermissible criterion of race. And this Court has clearly established that reviewing courts are to afford great deference to the trial court's factual findings regarding this crucial question of motive. *Batson*, 476 U.S. at 98 n.21; *Hernandez* v. *New York*, 500 U.S. 352, 364-65 (1991); *Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003). Most recently, in *Snyder* v. *Louisiana*, 552 U.S. 472, 477 (2008), this Court again reaffirmed that the trial judge, who observes the witness, plays the pivotal role in the *Batson* inquiry. Determinations of credibility and demeanor "lie particularly within the trial judge's province." *Id.* In the absence of exceptional circumstances, deference is given to the trial court. *Id.*

Given the deference that is already afforded to a trial court's ruling, the relief that is available for a *Batson* claim is even more limited under AEDPA's deferential standard of review. See *Knowles* v. *Mirzayance*, __ U.S. __, 129 S. Ct. 1411, 1420 (2009) (AEDPA requires doubled deference where original claim itself requires deference). A federal habeas court is limited under 28 U.S.C. § 2254(d)(2), as enacted by AEDPA, to determine whether the state court's crucial finding about purposeful discrimination was "objectively unreasonable" in light of the evidentiary record. See *Rice* v. *Collins*, 546 U.S. 333 (2006). Under § 2254(d)(2), a federal court must be careful not to "improperly substitute[] its evaluation of the record for that of the state trial court." *Rice*, 546 U.S. at 337-38. To find an unreasonable determination of the facts under § 2254(d)(2), the facts must "compel the conclusion that the [state court fact-finder] had no permissible alternative but to" reach a different determination.

Id. at 341. "State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id.* at 338-39; § 2254(e)(1).

The record in this case, however, presented no exceptional circumstances that warranted the Ninth Circuit's departure from the deference owed under *Batson* and *Hernandez* to the trial court. Certainly, the Ninth Circuit claimed none.

Further, the record provided no basis for the Ninth Circuit to conclude that the state court had unreasonably determined the facts in light of the evidence, or that "clear and convincing evidence" disproved those findings. To the contrary, the prosecutor gave race-neutral reasons (negative experience with law enforcement and occupation or educational experience) of a kind that the Ninth Circuit, as well as other circuit courts, have consistently found permissible.[1] Those reasons were

---

[1] The Ninth Circuit has held that a negative experience with law enforcement is an acceptable, race-neutral explanation to strike a potential juror. *Mitleider v. Hall*, 391 F.3d 1039, 1048 (9th Cir. 2004); see also *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987) (challenges based on family member's negative experiences with law enforcement have been upheld under *Batson*). Excluding jurors because of their profession is wholly within the prosecutor's prerogative. *United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987). It is also entirely permissible for a prosecutor to excuse a prospective juror based on her educational experience. See *United States v. Campbell*, 317 F.3d 597, 605-06 (6th Cir. 2003); *United States v. Alanis*, 265 F.3d 576, 584 (7th Cir. 2001) ("The attainment of certain educational level has been accepted by numerous circuits as a race neutral criterion for exercising a peremptory challenge under the *Batson* mandate, and, as far as we can determine, has been rejected by none"); *Batson*, 476 U.S. at 89 n.12 (lawyers wish to know as much as possible about

(continued...)

amply corroborated by the record. And the state judge, as the factfinder with the pivotal role, credited those stated reasons as the true ones.

The Ninth Circuit, however, overrode that finding with one of its own, apparently based on nothing more than an inference it chose to draw from the fact that the prosecutor had challenged two of the three prospective African-American jurors and from the panel's unexplained view that the voir dire record somehow reflected different treatment of similarly-situated jurors. Regardless of the Ninth Circuit's own view from its remote perch, however, the record clearly supports the state court's fact finding as at least reasonable.

Indeed, the trial record demonstrates that the state court was absolutely correct. That record supports the state court's factual finding that no other jurors were similarly situated to Ms. J. Both the state court of appeal and the federal district court found that no other juror had an educational background in social work—the particular kind of background the prosecutor specially disfavored. It is unexplained, and indeed inexplicable, how the Ninth Circuit could conclude other jurors were similarly situated to Ms. J.[2]

The record also supports—as reasonable and more—the state court's findings regarding Mr. S. No other juror reported experiencing years of repeated

---

(...continued)
prospective jurors, including their age, education, employment, and economic status, so they can ensure selection of jurors who at least have an open mind about the case).

[2] At oral argument in the Ninth Circuit, Ms. J was not even a topic of discussion. See www.ca9.uscourts.gov, audio transcript for *Jackson* v. *Felkner*, case no. 09-15379.

harassment by local law enforcement because of race and age. It was more than reasonable for the state court to conclude that a juror who believed he had received an out-of-state traffic ticket because of his California license plates was not similarly situated to Mr. S. It would trivialize racial discrimination and harassment to equate the two. Further, the prosecutor's challenge of a Caucasian juror who claimed he had been assaulted by a local police officer reasonably confirmed that the prosecutor legitimately challenged jurors whose negative experience with law enforcement presented a risk of potential bias. The legitimate basis for the prosecutor's challenge of Mr. S is further evidenced by the fact that defense counsel never stated any reasons why he believed the prosecutor might have excluded Mr. S from the jury based on race. In fact, defense counsel stated that he "let Mr. [S] slide because [he] anticipated the response would be made." As the federal district court found, it appeared the trial judge and defense counsel tacitly acknowledged that there was a sufficient basis other than race for challenging Mr. S.

The Ninth Circuit cited its own precedent *Ali* v. *Hickman*, 584 F.3d 1174, 1182 (9th Cir. 2009), as "holding under similar circumstances that the California Court of Appeal's finding of no pretext was unreasonable." But, as the State elsewhere has explained, the Ninth Circuit was wrong in *Ali* too. See *Cate* v. *Ali*, 2010 WL 304266 (U.S.), pet. for cert. filed Jan. 21, 2010. Moreover, the Ninth Circuit in *Ali* relied on a "comparative analysis" of the jurors that the state court had declined to undertake. *Ali*, 584 F.3d at 1180-81. Here, in contrast, the state court of appeal engaged in comparative juror analysis. The Ninth Circuit never explained why the

state court's comparative juror analysis in this case did not reasonably support its ultimate finding that the prosecutor's challenges were in fact motivated by race-neutral considerations.

This Court, in correcting a similar error by the Ninth Circuit in *Rice* v. *Collins*, cautioned that AEDPA deference precludes the federal court from relying merely on debatable inferences from the record as a basis for rejecting state court findings of fact. 546 U.S. at 341-42. The Ninth Circuit disregarded that admonition here. Arguably, as reflected in the Ninth Circuit oral argument in this case, Mr. S's claim that he still could be fair might be cited as possibly true. See www.ca9.uscourts.gov, audio transcript for *Jackson* v. *Felkner*, case no. 09-15379. But, just as in *Rice*, it hardly compelled any conclusion under § 2254 that the prosecutor could have no legitimate basis for doubting it. Indeed, as the district court recognized, the record showed that Mr. S had hesitated and bit his lip before asserting that he could be fair and impartial. And Mr. S even acknowledged that he had hesitated because he had a "lot of baggage" about his niece and nephew.

Similarly, excluding jurors on the stated ground of negative experience with law enforcement arguably might impact African-American jurors; and some might argue that it could raise at least a debatable inference that citing such a factor might be a pretext for racial discrimination. See www.ca9.uscourts.gov, audio transcript for *Jackson* v. *Felkner*, case no. 09-15379. But no "clearly established Federal law" binding on the States and on the federal habeas court for § 2254(d) deferential-review purposes, invalidates honest reliance on such considerations in jury selection. In any event, any such concern would have been insufficient here to

establish that the state court's credibility determination in this case was unreasonable based on the record in this case.

In *Rice*, the Ninth Circuit recited the proper standard of review, but this Court determined that in fact it had merely substituted its judgment for that of the state trial court. *Rice*, 546 U.S. at 337-38. Contrary to this Court's dictate, the Ninth Circuit here improperly substituted its own judgment for that of the state court once again.

II. THE NINTH CIRCUIT'S MISAPPLICATION OF *BATSON* AND AEDPA IS AN IMPORTANT AND RECURRING ISSUE

Under the decision in this case as explained by the Ninth Circuit, a habeas court might facilely invoke comparative juror analysis as if it always trumped the state court's credibility determinations, without even explaining how such a fact-intensive inquiry led to such a result. Here, the Ninth Circuit granted the extraordinary remedy of habeas relief with no apparent basis. The Ninth Circuit's failure to even explain its remarkable result serves to highlight that its decision is indefensible under both *Batson* and AEDPA.

In a relatively short time period, the Ninth Circuit has found *Batson* error in four cases, this one and three others, based on its own comparison of jurors from a cold record despite the deferential standards of review that apply to *Batson* and AEDPA claims. See *Ali* v. *Hickman*, 584 F.3d 1174 (9th Cir. 2009) (habeas relief in first-degree murder case); *Rivera* v. *Nibco*, No. 09-15136, 2010 WL 1193319 (9th Cir. March 29, 2010) (reversed jury verdict in a 52-

day trial).[3] *Reynoso* v. *Hall*, No. 08-15800, 2010 WL 3516410 (9th Cir. Sept. 7, 2010) (habeas relief in first-degree murder case).[4]

Here, the Ninth Circuit's unexplained ruling departs from judicial norms for granting an extraordinary remedy such as habeas relief. See Sup. Ct. Rule 10(a). The unexplained ruling is particularly disturbing when multiple courts, including the federal district court, came to a contrary conclusion. If such unexplained rulings were to become the norm, the decisions will become review-proof in derogation of the deference owed to state court decisions under AEDPA.

In *Rice*, this Court granted review because the Ninth Circuit had misapplied the deferential standard of review required under AEDPA. And, indeed, it has granted certiorari and reversed many Ninth Circuit decisions in the very recent past for failure to abide by the deferential-review reform enacted by Congress in AEDPA. This Court's review is warranted again to correct the Ninth Circuit's misapplication of AEDPA and of this Court's *Batson* precedents.

---

[3] A petition for writ of certiorari is pending in this Court. The petition refers to this case as an example of the Ninth Circuit's improper approach to basic principles of deference. See *Nibco* v. *Rivera*, No. 10-383, pet. for cert. filed Sept. 17, 2010, at 29.

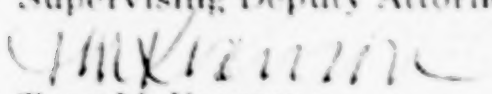
[4] In *Reynoso*, Judge Callahan dissents, finding that the majority misapprehends both the requirements of AEDPA and controlling Supreme Court opinions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General



TAMI M. KRENZIN
Deputy Attorney General
Counsel of Record
Counsel for Petitioner

December 2, 2010

SA2009310120
31138264.doc

APPENDIX

178

(2)

Supreme Court, U.S.
FILED

10-797

DEC 2 - 2010

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

T. FELKNER, *Petitioner*,

v.

STEVEN FRANK JACKSON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General
TAMI M. KRENZIN
Deputy Attorney General
Counsel of Record
300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-2394
Fax: (916) 324-2960
Tami.Krenzin@doj.ca.gov
Counsel for Petitioner

RECEIVED
DEC 1 2 2010
OFFICE OF THE CLERK
SUPREME COURT, U.S.

COPY

INDEX TO APPENDIX

Page

Memorandum 1
United States Court of Appeals
For the Ninth Circuit
Jackson v. *Felkner*
Case No. 09-15379

Order on Petition for Writ of Habeas Corpus 4
United States District Court
For the Eastern District of California
Jackson v. *Felkner*
Case No. CIV 07-0555 RJB

Opinion 41
California Court of Appeal
Third Appellate District
People v. *Jackson*
Case No. C048079

Denial of Petition for Review 56
California Supreme Court
People v. *Jackson*
Case No. S145276

Denial of Petition for Rehearing 57
United States Court of Appeals
For the Ninth Circuit
Jackson v. *Felkner*
Case No. 09-15379

FILED
JUL 23 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN FRANK JACKSON, Petitioner – Appellant, v. T. FELKNER, Respondent - Appellee.	No. 09-15379 D.C. No. 2:07-cv-00555-RJB MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Robert J. Bryan, District Judge, Presiding

Argued and Submitted April 15, 2010
San Francisco, California

Before: SCHROEDER and RAWLINSON, Circuit Judges, and COLLINS, District Judge**

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

Appellant Steven Frank Jackson (Jackson) appeals the district court's denial of his petition for a writ of habeas corpus, contending that the prosecutor's peremptory challenges excusing two African-American jurors violated his rights under the Sixth and Fourteenth Amendments. Because Jackson filed his habeas petition after 1996, his claim is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Byrd v. Lewis*, 566 F.3d 855, 859 (9th Cir. 2009).

"Under AEDPA, [Jackson's] petition can be granted only if the state court determination resolving his claim was contrary to, or involved an unreasonable application of, clearly established Federal law ...." *Id.* (citation and internal quotation marks omitted). It is clearly established federal law that the Equal Protection Clause prohibits the prosecutor from challenging prospective jurors solely on the basis of race. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see also Ali v. Hickman*, 584 F.3d 1174, 1180 (9th Cir. 2009), *as amended*. "A *Batson* challenge has three steps: first, the defendant must make a prima facie showing that a challenge was based on race; second, the prosecution must offer a race-neutral basis for the challenge; and third, the court must determine whether the defendant has shown purposeful discrimination." *Cook v. Lamarque*, 593 F.3d 810,814 (9th Cir. 2010) (citations and internal quotation marks omitted). In evaluating pretext, our precedent requires a comparative juror analysis. *See Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005)).

The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors. *See Ali*, 584 F.3d at 1182 (holding under similar circumstances that the California Court of Appeal's finding of no

pretext was unreasonable). Therefore, we reverse the district court's denial of Jackson's petition for writ of habeas corpus.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN FRANK JACKSON, Petitioner, v. T. FELKER, Respondent.	Case No. CIV 07-0555RJB ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

This matter comes before the court on petitioner's petition for writ of habeas corpus. Dkt. 1. The court has considered the relevant documents and the remainder of the file herein.

PROCEDURAL AND FACTUAL HISTORY

Petitioner is a state prisoner currently incarcerated at High Desert State Prison in Susanville, California. He filed this petition for writ of habeas corpus to challenge his 2004 Sacramento County conviction. Dkt. 1.

Petitioner was convicted by a jury of first degree burglary (Cal. Pen. Code, § 459) (Count 16), sexual battery (Cal. Pen. Code, § 243.4, subd. (a) (Count 15); forcible oral copulation (Cal. Pen. Code, § 288a, subd. (c) (2) (Count 14), three counts of forcible sexual penetration (Cal. Pen. Code, § 289, subd. (a)(l) (Counts 11, 12, 13), and ten counts of forcible rape (Cal. Pen. Code, § 261, subd. (a)(2) (Counts 1-10). In bifurcated proceedings, the trial court found two prior convictions to be true for purposes of Cal. Pen. Code, section 667, subdivisions (a), (b) -(i) and section 1170.12 (the three strikes law). As a result o [sic] the convictions and enhancement, petitioner was sentenced to a determinate state

prison term of ten years plus an indeterminate term of 300 years to life.

The California Court of Appeal summarized the facts of the case as follows:

> Defendant committed numerous sex offenses upon the 72-year-old victim after breaking into her apartment in the early morning hours. DNA evidence from saliva on the victim's breast established defendant's identity as the perpetrator. Defendant lived in the same apartment complex as the victim.

People v. Jackson, 2006 WL 1660795 at *1 (Cal.App. 3 Dist.).

Petitioner filed a direct appeal with the California Court of Appeal, Third Appellate District, which affirmed his conviction on June 15, 2006. *People v. Jackson*, 2006 WL 1660795. Petitioner's petition for review was denied by the California Supreme Court on August 30, 2006. Dkt. 29, Lodged Document 6.

On March 21, 2007, petitioner filed this petition for writ of habeas corpus. Dkt. 1. On May 22, 2007, the court appointed counsel to represent petitioner. Dkt. 7. On October 16, 2007, petitioner filed a first amended petition for writ of habeas corpus. Dkt. 19. On February 14, 2008, respondent filed an answer to the petition and relevant portions of the record. Dkt. 28 and 29. On May 16, 2008, petitioner filed a traverse. Dkt. 38. The court has carefully reviewed the entire record in this case.

CLAIMS

Petitioner raises the following three claims in his amended petition:

> 1. Whether, because the prosecutor used peremptory challenges to strike two prospective black jurors called to the jury box, and the prosecutor's given reason was pretext for racial discrimination, Mr. Jackson's subsequent conviction

violates the Sixth and Fourteenth Amendments of the United States Constitution.

2. Whether criminal propensity evidence is admissible in California under the United States Constitution.

3. Whether the trial court violated Mr. Jackson's Due Process rights by telling the jury that if proved, the jury could rely on criminal disposition alone to find Mr. Jackson guilty because the standard of proof for a true finding on propensity is less than reasonable doubt.

Docket 19, at 12-13.

EXHAUSTION

Before claims may be raised in a federal habeas corpus petition, state remedies must be exhausted; or an applicant must show there is either an absence of available state corrective process or that circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254(b)(1); *see also, Rose v. Lundy*, 455 U.S. 509 (1982). A claim has been exhausted once it has been fairly presented to the state's highest court and the court has had the opportunity to rule on the merits of the claim. *See O'Sullivan v. Boerckel*, 119 S.Ct. 1728, 1733-34 (1999); *Picard v. Connor*, 404 U.S. 270, 275-276 (1971); *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

A petitioner must present the claims to the state's highest court based upon the same federal legal theory and factual basis as the claims are subsequently asserted in the habeas petition. *Hudson v. Rushen*, 686 F.2d 826, 829-830 (9th Cir. 1982), *cert denied* 461 U.S. 916 (1983); *Schiers v. California*, 333 F.2d 173, 176 (9th Cir. 1964). Specifically, a petitioner must apprise the state courts that an alleged error is not only a violation of

state law, but a violation of the Constitution. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). Vague references to broad constitutional principles such as due process, equal protection, or a fair trail [sic] do not satisfy the exhaustion requirement. *Gray v. Netherland*, 518 U.S. 152, 162 (1996); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999); *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 815 (2000). A petitioner must include reference to a specific federal constitutional guarantee as well as a statement of the facts that entitle the petitioner to relief. *Gray v. Netherland*, 518 U.S., at 162-163.

In this case, petitioner exhausted his claims in state court. Accordingly, the court has reviewed the claims on the merits.

STANDARD OF REVIEW

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d). Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 120 S.Ct. 1495, 1523 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.*

A determination of a factual issue by a state court shall be presumed correct, and the applicant

has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

DISCUSSION

1. Peremptory Challenges

Claim. Petitioner contends that the prosecutor exercised his peremptory challenges in a racially biased manner in eliminating two African-Americans from the jury panel. Petitioner claims that the prosecutor violated his Sixth Amendment right to an impartial jury and his Fourteenth Amendment right to Equal Protection.

California Court of Appeal Decision. In reviewing this claim, the California Court of Appeal concluded as follows:

> During jury selection, defense counsel claimed the prosecutor had exercised his peremptory challenges in a racially biased manner in eliminating two African-Americans from the jury panel. Defendant specifically cited the prosecutor's peremptory challenges of prospective juror S., a male, and prospective juror J., a female. Both are African-American as is defendant. The trial court had the prosecutor explain his reasons and thereafter rejected defendant's claim. Defendant contends on appeal that the trial court erroneously denied his *Wheeler-Batson motion*. We disagree.
>
> " 'The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution (*People v. Wheeler* [, *supra*, 22 Cal.3d at 19 pp. 276-277[ ) as well as the equal protection clause of the Fourteenth Amendment to

the United States Constitution. (*Batson v. Kentucky* [, *supra*,] 476 U.S. [at p.] 89).' [Citation.] 'A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing that one or more jurors has been excluded on the basis of group or racial identity .... Once a prima facie showing has been made, the prosecutor then must carry the burden of showing that he or she had genuine nondiscriminatory reasons for the challenge at issue.' [Citation.] "[T]he trial court must then decide ... whether the opponent of the strike has proved purposeful ... discrimination.'" [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 200(Ward).)

" 'The trial court's ruling on this issue is reviewed for substantial evidence.' [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges" 'with great restraint.' "[Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]. [Citation.] '[I]n fulfilling [this] obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the

prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom.' [Citation.]" (*Ward, supra*, 36 Cal.4th at p. 200.)

"The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective *reasonableness* of those reasons. [Citation.] So, for example, if a prosecutor believes a prospective juror with long, unkempt hair, a mustache, and a beard would not make a good juror in the case, a peremptory challenge to the prospective juror, sincerely exercised on that basis, will constitute an entirely valid and nondiscriminatory reason for exercising the challenge. [Citation.] It matters not that another prosecutor would have chosen to leave the prospective juror on the jury. Nor does it matter that the prosecutor, by peremptorily excusing men with long unkempt hair and facial hair on the basis that they are specifically biased against him or against the People's case or witnesses, may be passing over any number of conscientious and fully qualified potential jurors. All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. '[A] "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]'" (*People v. Reynoso* (2003) 31 9 Cal.4th 903, 924.)

In *Miller-El v. Dretke* (2005) 545 U.S. 231 [162 L.Ed.2d 196](*Miller-El*) and *Johnson v. California* (2005) 545 U.S. 162 [162 L.Ed.2d 129], the United States Supreme Court clarified the standards applicable to a defendant's motion claiming the prosecutor engaged in racial bias during jury selection.

In *Johnson v. California, supra*, 545 U.S. at pages _ [162 L.Ed.2d at pp. 138, 141], the United States Supreme Court rejected a test previously established by the California Supreme Court for a prima facie showing of racial bias and held instead of "'more likely than not'" the standard to be applied is whether "'the totality of the relevant facts gives rise to an inference of discriminatory purpose.'"

Miller-El, supra, 545 U.S. at page _ [162 L.Ed.2d at p. 221] held that comparative juror analysis may be conducted in evaluating whether a prosecutor's facially neutral reason conceals racial bias and the trial judge is required to "assess the plausibility of that reason in light of all evidence with a bearing on it." Whether comparative juror analysis must be conducted for the first time on appeal is a question the California Supreme Court has not since settled but instead has assumed it was required. (See *Ward, supra*, 36 Ca1.4th at p. 203; *People v. Schmeck* (2005) 37 Ca1.4th 240,270; *People v. Gray* (2005) 37 Ca1.4th 168, 188-189; *People v. Cornwell* (2005) 37 Ca1.4th 50, 71.) We will review the comparisons drawn by defense appellate counsel on the merits.

Prospective Juror S

Juror S., a postal worker, requested to be questioned in private. Outside the presence of the other jurors, juror S. explained that his niece and nephew had been molested by his brother-in-law, that his friend had been charged and convicted of rape in a high profile case in Sacramento, and that his father had been robbed. The prosecutor asked, "When [defense counsel] just asked you a question, if you could be fair and impartial, you hesitated a little bit and kind of bit your lip ... [¶] ... you hesitated a little bit, and you kind of-your mouth moved. Those are the things I was watching on you." Juror S. responded that he hesitated because he had a "lot of baggage" about his niece and nephew. He told the court he was comfortable sitting on this case.

Along with the other prospective jurors, juror S. was asked about friends or relatives in law enforcement. Juror S. knew and socialized with a Sacramento police officer as well as two retired deputy sheriffs, a husband and wife. When asked about negative encounters with law enforcement, juror S. explained that although 20 years ago, for a period of about 14 years from the age of 16 years old to 30 years old, he had been stopped numerous times by mostly Caucasian officers when driving or walking in Rancho Cordova, Fresno and the Sacramento area because of his race and age. The prosecutor asked whether he had reported these encounters. Juror S. responded, "Seemed like it would be a waste of time because I would be complaining to the people that I felt I was being harassed by."

He insisted that his negative encounters with law enforcement officers would not affect his ability to be fair and to judge the credibility of witnesses.

Prospective Juror J.
Juror J. was employed in "property management." She had lived in the Greenhaven area for 18 years. She knew people who had been arrested for driving under the influence, insurance fraud and mayhem and had gone to some of the trials. When the court asked juror J. whether there was any reason why she would not be fair to both sides, she said "no" and then revealed that she had been to graduate school in 1992 and had completed an internship "at the branch in the psychiatric department." Juror J. apparently indicated on her juror questionnaire form that she had a master's degree in social work.

Peremptory Challenges
After the first set of jurors in the box were questioned, the prosecutor exercised his fifth peremptory challenge to remove prospective juror S.

Prospective juror J. was seated and questioned some time later. The prosecutor exercised his twelfth peromptory challenge to remove prospective juror J. Defense counsel then made a *Wheeler* motion, arguing the prosecutor used his peremptory challenges based on the race of prospective jurors S. and J. The court noted that both jurors were African-American as was another prospective juror. The judge did not state on the record that she found that defendant had made a prima facie showing

but instead simply asked the prosecutor for his reasons.

The prosecutor responded, "Well, I'm not sure [defense counsel has] been able to show there's been some sort of systematic exclusion. ([Juror] [r]edacted) is in the box. He was in the box when I passed twice on the jury, which would indicate that if the defense would have passed after me, ([Juror] Redacted) would have been a juror. [¶] Mr. S[.] has had a history with law enforcement where for a certain point in his life he felt he was stopped for no reasons. Whether or not he still harbors any animosity is not something I wanted to roll the dice with. [¶] Ms. J[.], she was not dismissed for any race-based purpose. She was dismissed based on her educational background. I don't like to keep social workers. [¶] She's got a master in social work. She worked in the jail, yes, but she worked in the, probably in the psych unit as a sociologist of some sort. I don't have any other social workers up on the panel. And if I had my choice, I wouldn't have any. [¶] So that was my reason for dismissing her."

Defense counsel took issue only with the prosecutor's stated reason for removing juror J. Defense counsel argued that removing juror J. for "some educational or occupational reason ... [was] offensive and in itself invidious discrimination." The court noted that no one had objected to defense counsel exercising his peremptory challenges to remove all potential jurors with law enforcement experience. In denying the motion, the court stated, "in view of the fact [the prosecutor] has mentioned that social worker degree,

which [has] absolutely nothing to do with her race, I am going to deny the *Wheeler* motion."

Analysis

Initially, we note that the trial court did not expressly find that defense counsel had made a prima facie showing. But the trial court determined the prosecutor's reasons were race-neutral so the issue of defendant's showing is moot. (*Ward, supra*, 36 Cal.4th at p. 200, citing *Hernandez v. New York* (1991) 500 U.S. 352, 359 [114 L.Ed.2d 395,405].)

Defendant claims that juror S, who was not African-American, had had several negative experiences with law enforcement but was allowed to remain on the jury. Even so, defendant claims that the prosecutor's reason for exercising his peremptory right to excuse juror S. is not supported by the record since prospective juror S. stated that he did not judge all law enforcement officers based on the behavior of one and that he had friends who were officers and regularly socialized with a retired couple who had been deputy sheriffs.

The prosecutor stated a nondiscriminatory reason for exercising his peremptory challenge to remove juror S. Juror S. stated that he had been stopped numerous times based on his race and age and considered it harassment. Peremptory challenges based on a negative experience with law enforcement is a proper race-neutral reason. (*People v. Turner* (1994) 8 Cal.4th 137, 171.)

Prospective juror S.'s negative experiences are not comparable to juror 8's experiences. Juror 8 explained he had been stopped once by law enforcement officers, "Well, I got stopped in Illinois, and I really feel it was a scam. They were watching for Californians. I think it was a setup. [¶] They had a school bus going down the freeway, and it stops right in the middle of the freeway. And just as you get ready to pass it, flops out the stop sign. Then right away, there's a patrolman on your tail. And you['re] from out of state, so they let you off with an $80 payoff because they know you're on your way home .... [¶] ... I'm sure it was a setup." He said that he believed "the California plates had something to do with it." Juror 8 had been the victim of a car burglary and was disappointed that law enforcement had not done a thorough investigation.

Juror 8's negative experience out of state and the car burglary is not comparable to juror S.'s 14 years of perceived harassment by law enforcement based in part on race.

The Attorney General notes another juror who claimed he would be fair was removed by the prosecutor. Juror C. had been assaulted by a Roseville police officer in 2002 and filed a civil suit against him. Juror C. had three pending criminal charges against him for the same instance. Juror C. claimed he harbored no animosity towards law enforcement. The prosecutor exercised his third peremptory challenge to remove prospective juror C.

Defendant claims that when the prosecutor was concerned with the educational or occupational backgrounds

of other jurors, who defendant claims are Caucasian, the prosecutor asked several questions but asked none of prospective juror J. Defendant notes that the prosecutor questioned a prospective juror concerning his undergraduate degree in bio-chemistry and graduate degree in environmental engineering and two other jurors about their law degrees and positions. Defendant claims that although prospective juror J. had a master's degree in social work, she had not pursued a career in social work and instead had worked in property management for "18 years."

The prosecutor stated a nondiscriminatory reason for exercising his peremptory challenge to remove juror J. Juror J. had a master's degree in social work and had an internship in the psychiatric department of the "branch" which the prosecutor and defense counsel interpreted as the jail. Peremptory challenges based on experience in social services is a proper race-neutral reason (*People v. Trevino* (1997) 55 Cal.App.4th 396, 411; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315; see also *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791; *People v. Barber* (1988) 22 200 Cal.App.3d 378,394.)

Prospective juror J.'s educational background in social work is simply not comparable to the jurors with backgrounds in law, bio-chemistry or environmental engineering. The prosecutor focused on her internship experience in the psychiatric unit, presumably the jail. Defendant's statement that juror J. had been employed in property management

> for 18 years is not supported by the record. She stated she had lived in the Greenhaven area for 18 years.
>
> Moreover, the jury included an African-American. "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection." [Citation.]" (*Ward, supra*, 36 Cal. 4th at p. 203.) When defendant made his *Wheeler* objection, the trial court noted that the jury included another African-American after the prosecutor excused jurors S. and J. That juror's name is redacted in the reporter's transcript which means that juror sat on the jury (Cal. Rules of Court, rule 31.3(b)(1), (c)). Defendant challenges the reliance upon only record redaction to support this fact. He has cited nothing in the record to suggest otherwise. He simply argues that "[n]either counsel nor the court ever state[d] that the redacted juror sat on the jury." We are not persuaded.
>
> Defendant has failed to demonstrate that the prosecutor improperly exercised his peremptory challenges. We reject defendant's contention that the trial court erroneously denied his *Wheeler-Batson* motion.

People v. Jackson, 2006 WL 1660795 at * 1-6.

Legal Standard or Batson Violation. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v.*

Kentucky, 476 U.S. 79, 89 (1986). When a defendant alleges a *Batson* violation, a three-part burden shifting test is used to determine if the potential juror was challenged on the basis of impermissible discrimination. First, the defendant must make a *prima facie* showing that the challenge was based on an impermissible ground, such as race. *Id.* at 96. To establish a *prima facie* case, the defendant must show that the facts and circumstances of the case raise an inference that the prosecution has excluded jurors based on race. *Batson v. Kentucky*, 476 U.S. at 96; *Powers v. Ohio*, 499 U.S. 400, 404 (1991); *McClain v. Prunty*, 217 F.3d 1209, 1919-20 (9th Cir. 2000). This is a burden of production, not a burden of persuasion. *Green v. Lamarque*, 532 F.3d 1028, 1029 (9th Cir. 2008); *accord Johnson v. California*, 545 U.S. 162, 170-71 (2005). Second, if the trial court finds the defendant has made a *prima facie* case of discrimination, the burden then shifts to the prosecution to offer a race-neutral reason for the challenge that relates to the case. *Green v. Lamarque*, 532 F.3d at 1030; *accord Batson v. Kentucky*, 476 U.S. at 97. Third, if the prosecutor offers a race-neutral explanation, the trial court must decide whether the defendant has proved that the prosecutor's motive for the strike was purposeful racial discrimination. *Green v. Lamarque*, 532 F.3d at 1030; *accord Johnson v. California*, 545 U.S. at 168; *Batson v. Kentucky*, 476 U.S. at 98.

Where the State has put forward a race-neutral reason at step two, the court evaluates "all relevant circumstances." *Miller-El v. Dretke*, 545 U.S. 231,240 (2005), at step three, including whether the state's stated reasons are pretextual, to decide whether the prosecutor's motive for the strike establishes purposeful discrimination. In applying the *Batson* test to determine a prosecutor's discriminatory intent, the trial court must determine whether the stated reasons are race-neutral, relevant to the case, and "the prosecutor's genuine reasons for exercising a peremptory strike, rather than pretexts invented to hide purposeful discrimination." *Green v.*

LaMarque, 532 F.3d at 1030. The trial court must undertake a sensitive inquiry into all circumstantial and direct evidence bearing on the prosecutor's intent. *Id.* In *Miller-El v. Dretke*, *supra*, the Supreme Court employed a comparative juror analysis, comparing the characteristics of a struck juror with the characteristics of other potential jurors, particularly those jurors whom the prosecutor did not strike. *See Miller-El v. Dretke*, 545 U.S. at 241,247-48.

Factual Findings on Review of the Record. The California Court of Appeal decision accurately reflects the record. Juror S, an African American male, indicated that, because someone close to him had been the victim of a crime, he wanted to talk about it in private (Dkt. 29, Lodged Document 10, at 22-23), that his niece and nephew had been molested by a brother-in-law and his father had been robbed (Dkt. 29, 10 Lodged Document 10, at 33-35); and that an acquaintance had been convicted of rape (Dkt. 29, Lodged Document 10, at 35-38). The prosecutor observed that juror S hesitated and bit his lip when asked if he could be fair and impartial, juror S responded that he was hesitating "because, I didn't have any baggage, but with my niece and nephew, I have a lot of baggage" (Dkt. 29, Lodged Document 10, at 36-37). Juror S stated that he had been stopped quite often by mostly Caucasian police when he was between the ages of 16 and 30 (Dkt. 29, Lodged Document 10, at 98-99). Juror S also indicated that he socialized with a retired sheriff and his wife, and with a Sacramento police officer (Dkt. 29, Lodged Document 10, at 39-41); and that he would be comfortable sitting on a case like this (Dkt. 29, Lodged Document 10, at 38).

Juror J, an African-American female, stated that she had lived in the Greenhaven area for eighteen years. Dkt. 29, Lodged Document 10, at 188. When asked by the court if there was any reason she could think of why she couldn't be fair to both sides, Juror J stated: "No. But I would like to disclose when I was in graduate school, I did do

internship at the branch in the psychiatric department." Dkt. 29, Lodged Document 10, at 188.

Juror number 8, who was seated on the jury and is not African-American, stated that he had a friend who is retired from the highway patrol and is working for the Sacramento County Sheriff now (Dkt. 29, Lodged Document 10 at 46) and that he believed that he was the victim of a setup five to seven years before when he was stopped on the highway; and that he believed that having California license plates had something to do with it (Dkt. 29, Lodged Document 10, at 56-57). Juror number 8 also stated that his car had been broken into on two occasions, and that he was disappointed when the police did not file a report, but that he got over it; and that he held onto a piece of fingerprint material for two to four weeks before he realized that the police didn't have time to investigate this kind of crime. Dkt. 29, Lodged Document 10, at 95-96.

Defense counsel moved for a mistrial on the basis that the prosecution excused jurors S and J for racial reasons (Dkt. 29, Lodged Document 7, at 76-77). The record shows that another African-American juror remained on the venire and was passed twice by the prosecutor, because the name of that juror was redacted in the court reporter's transcript, it appears that that juror was seated and participated in the case (Dkt. 29, Lodged Document 7, at 77). The record showed that the prosecutor gave his reasons for the peremptory strikes (Dkt. 29, Lodged Document 7, at 78-79); defense counsel "let Mr. [S] slide because I anticipated the response that would be made" (Dkt. 29, Lodged Document 7, at 78-79); that juror J had put down (apparently on a jury questionnaire) that she had a Master of Social Work degree (Dkt. 29, Lodged Document 7, at 78-79); and that the trial judge concluded, with regard to juror J that "if [the prosecutor] is inclined to think that a social worker might not be best for his jury, that the Court would have to accept that (Dkt. 29, Lodged Document 7, at 80).

Batson Test. The court next applies the facts of the case to the three elements of the *Batson* test. With regard to the first element, the trial judge did not find on the record that defendant had made a *prima facie* showing that the challenge was based on race. However, both jurors S and J were African-American and were excluded from the jury by peremptory challenge of the prosecutor.

Assuming that defendant had made a *prima facie* case of exclusion based on race, with the second element of the test, the burden shifts to the prosecution to offer a race-neutral reason for the challenge that relates to the case. In this case, the prosecutor stated a race-neutral reason for the challenges to jurors S and J. With regard to juror S, the prosecutor stated that Mr. S had had a history with law enforcement where for a certain point in his life he felt he was stopped for no reasons, and "[w]hether or not he still harbors any animosity is not something I wanted to roll the dice with." Dkt. 29, Lodged Document 7, at 78. With regard to juror J, the prosecutor stated that she was dismissed because she had a Master of Social Work degree and that she had worked "in the, probably in the psych unit as a sociology of some sort. I don't have any other social workers up on the panel. And if I had my choice, I wouldn't have any." Dkt. 29, Lodged Document 7, at 78. The prosecutor stated race-neutral reasons for excluding jurors S and J from the jury.

The third step in the *Batson* analysis is for the trial court to determine whether the defendant proved that the prosecutor's motive for the strike was purposeful racial discrimination. In this case, defense counsel did not state reasons why he believed that juror S was excluded from the jury on the basis of his race. In fact, defense counsel stated that "I let Mr. [S] slide because I anticipated the response that would be made." Dkt. 29, Lodged Document 7, at 80. The trial court did not specifically address the peremptory challenge regarding juror S. It appears that the trial judge and counsel tacitly acknowledged

that there was sufficient basis other than race for challenging juror S. Further, the record shows that juror S had had experience with the police, in which he believed that, for a number of years, he had been targeted because of his race. Juror 8, who was seated on the jury, had also had experience with being stopped by the police once, while in Illinois; that experience was based upon his living in California, not on the basis of race. The California Court of Appeal concluded that the experiences of juror S and juror 8 were not comparable. That conclusion is reasonable, based upon the record. Further, in addition to the reasons set forth by the prosecutor, juror S had "a lot of baggage" with regard to the molestation of his niece and nephew, asked to discuss the issue in private, and hesitated and bit his lip when asked if he could be fair and impartial. The record does not show that the prosecutor's motive for the strike of juror S was purposeful discrimination.

With regard to juror J, the trial judge accepted the prosecutor's reason that he struck this juror because of her degree in social work and her experience at the jail. Although petitioner maintains that the prosecutor should have asked more follow-up questions of juror J, the prosecutor stated that there were no other social workers on the panel, and that if he had his choice, he would not have any on the jury. Dkt. 29, Lodged Document 7, at 78. It is unclear why the prosecutor should have asked further questions when a social service background was unacceptable for him. Further, while the record shows that juror J was a property manager, it does not show that she had been a property manager for eighteen years. The record does not show that the prosecutor's motive for the strike of juror J was purposeful discrimination.

Finally, even though jurors S and J were African-American, the record shows that one other African-American was not challenged, and was apparently seated as a juror. In any event, the record shows that the prosecutor did not challenge one African-American in the jury pool, and that

individual was still part of the jury pool when the *Batson* challenges were made.

Conclusion. The California state court decisions rejecting petitioner's claim that his constitutional rights were violated when the prosecutor used peremptory challenges to strike African-American jurors S and J. were not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, nor did they result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. Petitioner's *Batson* claim is without merit.

2. Criminal Propensity Evidence

Claim. Petitioner contends that the admission of evidence regarding his prior sexual offenses to prove disposition to commit the charged sexual offense violated his right to Due Process under the Fifth and Fourteenth Amendments.

California Court of Appeal Decision. The California Court of Appeal summarized this claim as follows:

> Defendant contends the trial court violated his constitutional rights by admitting evidence of his prior sex crime pursuant to Evidence Code section 1108. He argues Evidence Code section 1108 is unconstitutional, violating his federal constitutional right to due process. FN2 Even assuming the statute is constitutional, he argues the jury was erroneously instructed that it could "rely exclusively on this evidence to convict...." He further argues reversal is required because the jury was allowed to convict on predisposition evidence proved by a preponderance of the evidence. We reject defendant's contention.
>
> Over defense objection based on remoteness, similarity and Evidence Code section 352, the trial court granted the

prosecutor's in limine motion to introduce evidence of defendant's prior 1984 conviction for sexual assault of Linda H. pursuant to Evidence Code section 1108 and *People v. Falsetta* (1999) 21 Ca1.4th 903(*Falsetta*). FN3

On February 17, 1984, defendant broke into Linda H.'s apartment through a kitchen window, entered her bedroom and, holding a straight edge razor, jumped on her while she was asleep in bed. When she yelled and tried to fight back, he slapped her in the face and threatened to kill her if she did not shut up. He said, "I came here to eat your pussy," and unzipped his pants. H. fought back harder. Defendant bit her below her breast. Her son opened her bedroom door and turned on the light. Defendant ran out of the apartment through the front door. H. had numerous bruises on her body. Defendant's sister lived next door in the same apartment complex. Defendant's palm print was recovered from the kitchen window and the wall nearby. When interviewed by an officer and asked whether he knew why, defendant stated he thought it was about a rape. He admitted knowing H. and claimed he had been in her apartment four or five times, including her bedroom once and kitchen. He claimed he was with Tiny the night of the sexual assault. When told his prints were found at H.'s apartment, he asked "Where at?"

The trial court instructed the jury in the language of CALJIC Nos. 2.50.01 [evidence of other sexual offenses], 2.50.2 [definition of preponderance of the evidence], 9.09 [assault with intent to

commit certain felonies] and 9.00 [assault-defined). FN4

Defendant recognizes that *Falsetta* rejected the argument that admission of propensity evidence pursuant to Evidence Code section 1108 violates a defendant's constitutional right to due process. He claims *Falsetta* was wrongly decided and raises the issue to preserve his right to further review. We are bound by *Falsetta* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450(*Auto Equity Sales*)) and accordingly reject this argument.

FN2. Defendant also cites but does not discuss his rights to confrontation and a fair trial. We likewise will not discuss the impact upon such rights.

FN3. Evidence Code section 1108 provides in relevant part, as follows:

"(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

[¶] ... [¶]

"(d) As used in this section, the following definitions shall apply:

"(1) 'Sexual offense' means a crime under the law of a state or of the United States that involved any of the following:

[¶] ... [¶]

"(B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem."

FN4. The trial court instructed as follows: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case. Sexual offense means a crime under the laws of a state or of the United States that involves any of the following: That is any conduct made criminal by Penal Code Section 220. The elements of this crime are set forth elsewhere in this instruction. If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is accused. However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes. You must not consider this evidence for any other purpose. [CALJIC No. 2.50.01]

"Preponderance of the evidence means evidence that was more-that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. You should consider all the evidence bearing upon every issue regardless of who produced it. [CALJIC No. 2.50.2]

"Every person who assaults another with the specific intent to commit forcible oral copulation is guilty of the crime of assault to commit forcible oral copulation in violation of Penal Code Section 220. In order to prove this crime, each of the following elements must be proved: One, a person was assaulted; and, two, the assault was made with the specific intent to commit forcible oral copulation. The crime of assault with intent to commit forcible oral copulation is complete if the assault is made and at any moment during the assault the aggressor intends to commit forcible oral copulation upon the person assaulted. [CALJIC No. 9.09]

"In order to prove an assault, each of the following elements must be proved: One, a person willfully and unlawfully committed an act which by its nature would probably and directly result in the application of physical force on another person; the person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and three, at the time the act was committed, the person committing the act

> had the present ability to apply physical force to the person of another. The word willfully means the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person or an actual awareness of the risk that might occur to another person. To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted, it may be considered in connection with other evidence in determining whether an assault was committed and, if so, the nature of the assault. [CALJIC No. 9.00]"

People v. Jackson, 2006 WL 1660795, * 6-7.

Legal Standard for Evidentiary Ruling. Federal courts defer to a state court's interpretation of state law unless the court's interpretation is untenable or amounts to a subterfuge to avoid federal review of a constitutional violation. *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir.), *cert. denied* 459 U.S. 1055 (1982).

Habeas relief is unavailable for error in the interpretation or application of state evidentiary rules. *Estelle v. McGuire*, 502 U.S. 62 (1991); *Middleton v. Cupp*, 768 F.2d 1083,1085 (9th Cir. 1985). In order to obtain habeas relief for a violation of state evidence rules, a petitioner must affirmatively demonstrate that the admission of the questioned evidence rendered the trial so fundamentally unfair as to violate federal due process. *Butcher v. Marquez*, 758 F.2d 373,378 (9th Cir. 1985).

Factual Findings on Review of the Record. The California Court of Appeal opinion accurately reflects the record. Linda H. testified consistent with the findings in the Court of Appeal decision. Dkt. 29, Lodged Document 7, at 252-268. The retired Sacramento police officer who was the crime scene investigator in the Linda H. incident in 1984 also

testified consistent with the Court of Appeal decision. Dkt. 29, Lodged Document 7, at 268-281.

Analysis and Conclusion. The United States Supreme Court has not decided whether admission of prior crimes evidence in a criminal trial violates a defendant's right to Due Process. *See Estelle v. McGuire*, 502 U.S. at 75 n.5 ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."). *See also Alberni v. McDaniel*, 458 F.3d 860, 863-64 (9th Cir. 2006).

In *People v. Falsetta*, 21 Cal.4th 903, 915-922 (1999), a California case in which a defendant was convicted of sex crimes after admission of evidence regarding prior sex offenses as propensity evidence, the California Supreme Court concluded that Evidence Code Section 1108, which permits evidence of prior sex offenses to be used to show propensity to commit a charged sex crime, does not violate Due Process. The California Supreme Court reasoned that (1) evidence of the prior acts is at least circumstantially relevant to the issue of the defendant's disposition or propensity to commit sex offenses; and (2) that the trial court could exclude the evidence under Evidence Code Section 352, which gives the court discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The California Supreme Court further concluded that the trial court erred in declining to give a special limiting instruction on the use of that evidence, but that the error was it harmless. *Id.* at 922-925. The California Supreme Court noted that the 1999 revision of CALJIC No. 2.50.01 adequately addressed the deficiencies in the *Falsetta* jury instructions. *Id.* at 923-924.

Defendant in *Falsetta* filed a petition for writ of certiorari to the United States Supreme Court,

raising the following issues: (1) Whether the admission of prior sex crimes to prove criminal disposition under Evidence Code section 1108 violated petitioner's Fourteenth Amendment right to due process of law; and (2) Whether the trial court erred by refusing to give any limiting instruction on the proper use of the prior sex crimes under Evidence Code section 1108. *Falsetta v. California*, 1998 WL 34188058. On April 24, 2000, the United States Supreme Court denied the petition for writ of certiorari. *Falsetta v. California*, 529 U.S. (2000).

CALJIC No. 2.50.01, as revised in 1999, was the instruction given in petitioner's case. *See* instruction as set forth in FN 4 in the California Court of Appeal decision above. The United States Supreme Court has not decided whether admission of prior sex crimes to prove criminal disposition violates a defendant's Due Process rights under the United States Constitution. The United States Supreme Court denied review in *Falsetta*, a case in which that issue was one of the issues presented. Accordingly, the California state court decisions rejecting petitioner's claim that admission of evidence regarding his prior sexual offenses to prove disposition to commit another sexual offense violated his right to Due Process under the Fifth and Fourteenth Amendments were not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, nor did they result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. Petitioner's claim is without merit.

3. Instructions

Claim. Petitioner contends that his right to Due Process was violated when the court instructed the jury that, if proved, the jury could rely on criminal disposition alone to find him guilty of the charged crimes. Petitioner argues that these instructions undercut the presumption of innocence and the right to proof beyond a reasonable doubt of every element of the charged offense by permitting

the jury to infer guilt based on a finding of criminal disposition alone.

California Court of Appeal Decision. The California Court of Appeal summarized this claim as follows:

> Defendant next argues that the trial court erroneously instructed the jury that it could rely "exclusively" or solely on this evidence to convict. We reject this argument.
>
> In *People v. Reliford* (2003) 29 Cal.4th 1007(Reliford), the California Supreme Court rejected the argument that CALJIC No. 2.50.01 (1999 rev.) as modified, could have been "interpreted to authorize a guilty verdict based solely on proof of uncharged conduct" or that a "juror could reasonably interpret the instructions to authorize conviction of a charged offense based solely on proof of an uncharged sexual offense." (*Id.* at pp. 1013, 1015.) In *People v. Pescador* (2004) 119 Cal.App.4th 252(*Pescador*), this court rejected a challenge to jury instructions similar to those in *Reliford* [CALJIC No. 2.50.02 (2000 rev.) and CALJIC No. 2.50.2] in a case involving prior acts of domestic violence evidence (Evid. Code, § 1109), relying on *Reliford* and concluding that there was no risk that the jury could convict based on disposition alone because the jury was so instructed. (*Pescador, supra*, 119 Cal.App.4th at pp. 258-262.)
>
> Defendant argues *Pescador* should be reconsidered and that *Reliford* did not consider the issue presented in *Pescador* and the issue presented here. *Reliford* held that the instructions did not lessen the prosecution's burden of proof (*Reliford, supra*, 29 Cal.4th at pp. 1015-1016.) The

> instruction here is significantly different than those before *Reliford* and *Pescador*, including the statement, "If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes." The jury here was instructed that the prior conviction alone was insufficient to prove the charged offense. We reject defendant's arguments.
>
> Finally, defendant argues reversal is required because the jury was allowed to convict on disposition evidence proved by a preponderance of the evidence. Defendant claims the instructions allowed the jury to infer guilt of the charged offense based on proof of the predicate fact, that is, the prior conduct, as long as it was proven by a preponderance of the evidence. As defendant recognizes, *Reliford* rejected this claim as do we. (*Auto Equity Sales, supra*, 57 Cal 2d 450.)

People v. Jackson, 2006 WL 1660795 at * 7-8

Legal Standard for Jury Instructions. Ordinarily, issues regarding jury instructions present questions of state law only and are, therefore, not susceptible of federal habeas corpus review. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). A faulty jury instruction requires habeas relief only if the instruction by itself so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. at 72; *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The instruction must be considered in the context of the instructions as a whole and the trial record. *Estelle v. McGuire*, 502 U.S. at 72; *Boyde v. California*, 494 U.S. 370, 378 (1990); *Cupp v. Naughton*, 414 U.S. 141, 147 (1973). The federal habeas court must determine whether

there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. *Estelle v. McGuire*, 502 U.S. at 63 (quoting *Boyde v. California*, 494 U.S. at 380).

Factual Findings on Review of the Record. In FN 4, the California Court of Appeal set forth the instructions that petitioner challenges. Those instructions are repeated here for ease of reference, as follows:

> FN4. Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case. Sexual offense means a crime under the laws of a state or of the United States that involves any of the following: That is any conduct made criminal by Penal Code Section 220. The elements of this crime are set forth elsewhere in this instruction. If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is accused. However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes. You must not consider

this evidence for any other purpose. [CALJIC No. 2.50.01]

Preponderance of the evidence means evidence that was more-that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. You should consider all the evidence bearing upon every issue regardless of who produced it. [CALJIC No. 2.50.2]

Every person who assaults another with the specific intent to commit forcible oral copulation is guilty of the crime of assault to commit forcible oral copulation in violation of Penal Code Section 220. In order to prove this crime, each of the following elements must be proved: One, a person was assaulted; and, two, the assault was made with the specific intent to commit forcible oral copulation. The crime of assault with intent to commit forcible oral copulation is complete if the assault is made and at any moment during the assault the aggressor intends to commit forcible oral copulation upon the person assaulted. [CALJIC No. 9.09]

In order to prove an assault, each of the following elements must be proved: One, a person willfully and unlawfully committed an act which by its nature would probably and directly result in the application of physical force on another person; the person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical

> force would be applied to another person; and three, at the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another. The word willfully means the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person or an actual awareness of the risk that might occur to another person. To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted, it may be considered in connection with other evidence in determining whether an assault was committed and, if so, the nature of the assault. [CALJIC No. 9.00]

Dkt. 29, Lodged Document 11, at 140-143.

Analysis and Conclusion. CALCJIC No. 2.50.01 instructed the jury (1) that if they find that the defendant committed a prior sexual offense, the jury may, but are not required to, infer that the defendant had a disposition to commit sexual offenses; (2) that if they find that the defendant had this disposition, they may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is accused; (3) that if they find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes; (4) that if they determine an inference properly can be drawn from this evidence, this inference is simply one item for them to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes; and (5) that they must not consider this evidence for any other purpose.

The California Court of Appeal noted that the jury was instructed that the prior conviction alone was insufficient to prove the charged offense, and

that the instruction did not allow the jury to infer guilt of the charged offense based on proof of the prior conduct. The California Court of Appeal conclusions were consistent with the instructions given to the jury. Considered in the context of the jury instructions as a whole, there is not a reasonable likelihood that the jury applied the challenged instructions in a way that violated the United States Constitution.

The California state court decisions rejecting petitioner's claim that his right to Due Process was violated when the court instructed the jury that, if proved, the jury could rely on criminal disposition alone to find him guilty were not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, nor did they result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. Petitioner's claim is without merit.

EVIDENTIARY HEARING

If a habeas applicant has failed to develop the factual basis for a claim in state court, an evidentiary hearing may not be held in federal court unless (A) the claim relies on (1) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, or (2) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. §2254(e)(2) (1996). Petitioner's claims rely on established rules of constitutional law. Further, petitioner has not set forth any factual basis for his claims that could not have been previously discovered by due diligence. Finally, the facts underlying petitioner's claims are insufficient to establish that no rational factfinder would have found him guilty of

the crime. Therefore, petitioner is not entitled to an evidentiary hearing.

CONCLUSION

The state court decisions denying petitioner's claims for relief and upholding petitioner's convictions were not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, nor did they result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. The petition for writ of habeas corpus should be denied and the case dismissed with prejudice.

CERTIFICATE OF APPEALABILITY

The district court should grant an application for a Certificate of Appealability only if the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner must make a showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 120 S.Ct. 1595, 1603-04 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

When the court denies a claim on procedural grounds, the petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 120 S.Ct. at 1604.

In the event that petitioner appeals the denial of his habeas corpus petition to the Ninth Circuit U.S. Court of Appeals, the court has determined that a Certificate of Appealability should be granted. The court has reviewed all of the claims on the merits.

While the court has denied the petition for writ of habeas corpus, reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Accordingly, a Certificate of Appealability should be granted on the following claims:

> 1. Because the prosecutor used peremptory challenges to strike two prospective black jurors called to the jury box, and because the prosecutor's given reason was pretext for racial discrimination, petitioner's subsequent conviction violated the Sixth and Fourteenth Amendments of the United States Constitution.
>
> 2. The admission of evidence regarding petitioner's prior sexual offenses to prove disposition to commit the charged sexual offense violated his right to Due Process under the Fifth and Fourteenth Amendments of the United States Constitution.
>
> 3. The trial court violated petitioner's Due Process rights under the United States Constitution by instructing the jury that if proved, the jury could rely on criminal disposition alone to find petitioner guilty because the standard of proof for a true finding on propensity is less than reasonable doubt.

Therefore, it is hereby

ORDERED that the petition for writ of habeas corpus is **DENIED**. A Certificate of Appealability is **GRANTED** on the issues set forth above ..

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

DATED this 19th day of February, 2009.

/S/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

Filed 6/15/06 P. v. Jackson CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b) This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN FRANK JACKSON, Defendant and Appellant	C048079 (Super. Ct. No. 03F00120)

A jury convicted defendant Steven Frank Jackson of first degree burglary (Pen. Code, § 459; undesignated section references are to this code; count 16), sexual battery (§ 243.4, subd. (a); count 15), forcible oral copulation (§ 288a, subd. (c)(2); count 14), three counts of forcible sexual penetration (§ 289, subd. (a)(1); counts 11, 12, 13) and 10 counts of forcible rape (§ 261, subd. (a)(2); counts 1-10). In bifurcated proceedings, the trial court found two prior convictions to be true for purposes of sections 667, subdivisions (a), (b)-(i) and 1170.12.

Sentenced to state prison, defendant appeals, contending (1) the trial court erroneously denied his *Wheeler-Batson* [1] motion and (2) the trial court erroneously admitted evidence under Evidence Code section 1108 and erroneously instructed thereon. We will affirm the judgment.

FACTS

Defendant's contentions require no detailed recitation of the facts. Defendant committed numerous sex offenses upon the 72-year-old victim after breaking into her apartment in the early morning hours. DNA evidence from saliva on the victim's breast established defendant's identity as the perpetrator. Defendant lived in the same apartment complex as the victim. Additional facts relevant to defendant's contentions will be recounted in our discussion of the same.

DISCUSSION

I

During jury selection, defense counsel claimed the prosecutor had exercised his peremptory challenges in a racially biased manner in eliminating two African-Americans from the jury panel. Defendant specifically cited the prosecutor's peremptory challenges of prospective juror S., a male, and prospective juror J., a female. Both are African-American as is defendant. The trial court had the prosecutor explain his reasons and thereafter rejected defendant's claim. Defendant contends on appeal that the trial court erroneously denied his *Wheeler-Batson* motion. We disagree.

"'The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under

---

[1] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*).

article I, section 16 of the California Constitution (*People v. Wheeler*[, *supra*, 22 Cal.3d at pp. 276-277]) as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution. (*Batson v. Kentucky* [, *supra*,] 476 U.S. [at p.] 89.)' [Citation.] 'A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing that one or more jurors has been excluded on the basis of group or racial identity. . . . Once a prima facie showing has been made, the prosecutor then must carry the burden of showing that he or she had genuine nondiscriminatory reasons for the challenge at issue.' [Citation.] '"[T]he trial court must then decide . . . whether the opponent of the strike has proved purposeful . . . discrimination."' [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 200 (Ward).)

"'The trial court's ruling on this issue is reviewed for substantial evidence.' [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "with great restraint."' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' [Citation.] '[I]n fulfilling [this] obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom.' [Citation.]" (*Ward*, *supra*, 36 Cal.4th at p. 200.)

"The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, not on the objective *reasonableness* of those reasons. [Citation.] So, for example, if a prosecutor believes a prospective juror with long, unkempt hair, a mustache, and a beard would not make a good juror in the case, a peremptory challenge to the prospective juror, sincerely exercised on that basis, will constitute an entirely valid and *nondiscriminatory* reason for exercising the challenge. [Citation.] It matters not that another prosecutor would have chosen to leave the prospective juror on the jury. Nor does it matter that the prosecutor, by peremptorily excusing men with long unkempt hair and facial hair on the basis that they are specifically biased against him or against the People's case or witnesses, may be passing over any number of conscientious and fully qualified potential jurors. All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. '[A] "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]'" (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

In *Miller-El v. Dretke* (2005) 545 U.S. 231 [162 L.Ed.2d 196] (*Miller-El*) and *Johnson v. California* (2005) 545 U.S. 162 [162 L.Ed.2d 129], the United States Supreme Court clarified the standards applicable to a defendant's motion claiming the prosecutor engaged in racial bias during jury selection.

In *Johnson v. California, supra*, 545 U.S. at pages ___ [162 L.Ed.2d at pp. 138, 141], the United States Supreme Court rejected a test previously established by the California Supreme Court for a prima facie showing of racial bias and held instead of "'more likely than not'" the standard to be applied is whether "'the totality of the relevant facts gives rise to an inference of discriminatory purpose.'"

Miller-El, supra, 545 U.S. at page ___ [162 L.Ed.2d at p. 221] held that comparative juror analysis may be conducted in evaluating whether a prosecutor's facially neutral reason conceals racial bias and the trial judge is required to "assess the plausibility of that reason in light of all evidence with a bearing on it." Whether comparative juror analysis must be conducted for the first time on appeal is a question the California Supreme Court has not since settled but instead has assumed it was required. (See *Ward, supra*, 36 Cal.4th at p. 203; *People v. Schmeck* (2005) 37 Cal.4th 240, 270; *People v. Gray* (2005) 37 Cal.4th 168, 188-189; *People v. Cornwell* (2005) 37 Cal.4th 50, 71.) We will review the comparisons drawn by defense appellate counsel on the merits.

Prospective Juror S.

Juror S., a postal worker, requested to be questioned in private. Outside the presence of the other jurors, juror S. explained that his niece and nephew had been molested by his brother-in-law, that his friend had been charged and convicted of rape in a high profile case in Sacramento, and that his father had been robbed. The prosecutor asked, "When [defense counsel] just asked you a question, if you could be fair and impartial, you hesitated a little bit and kind of bit your lip. . . [¶] . . . you hesitated a little bit, and you kind of -- your mouth moved. Those are the things I was watching on you." Juror S. responded that he hesitated because he had a "lot of baggage" about his niece and nephew. He told the court he was comfortable sitting on this case.

Along with the other prospective jurors, juror S. was asked about friends or relatives in law enforcement. Juror S. knew and socialized with a Sacramento police officer as well as two retired deputy sheriffs, a husband and wife. When asked about negative encounters with law enforcement, juror S. explained that although 20 years ago, for a period of about 14 years from the age of 16 years old to 30 years old, he had been stopped numerous times by mostly Caucasian officers when driving or walking

in Rancho Cordova, Fresno and the Sacramento area because of his race and age. The prosecutor asked whether he had reported these encounters. Juror S. responded, "Seemed like it would be a waste of time because I would be complaining to the people that I felt I was being harassed by." He insisted that his negative encounters with law enforcement officers would not affect his ability to be fair and to judge the credibility of witnesses.

Prospective Juror J.

Juror J. was employed in "property management." She had lived in the Greenhaven area for 18 years. She knew people who had been arrested for driving under the influence, insurance fraud and mayhem and had gone to some of the trials. When the court asked juror J. whether there was any reason why she would not be fair to both sides, she said "no" and then revealed that she had been to graduate school in 1992 and had completed an internship "at the branch in the psychiatric department." Juror J. apparently indicated on her juror questionnaire form that she had a master's degree in social work.

Peremptory Challenges

After the first set of jurors in the box were questioned, the prosecutor exercised his fifth peremptory challenge to remove prospective juror S.

Prospective juror J. was seated and questioned some time later. The prosecutor exercised his twelfth peremptory challenge to remove prospective juror J. Defense counsel then made a *Wheeler* motion, arguing the prosecutor used his peremptory challenges based on the race of prospective jurors S. and J. The court noted that both jurors were African-American as was another prospective juror. The judge did not state on the record that she found that defendant had made a prima facie showing but instead simply asked the prosecutor for his reasons.

The prosecutor responded, "Well, I'm not sure [defense counsel has] been able to show there's been some sort of systematic exclusion. ([Juror] [r]edacted) is in the box. He was in the box when I

passed twice on the jury, which would indicate that if the defense would have passed after me, ([Juror] Redacted) would have been a juror. [¶] Mr. S[ ] has had a history with law enforcement where for a certain point in his life he felt he was stopped for no reasons. Whether or not he still harbors any animosity is not something I wanted to roll the dice with. [¶] Ms. J[ ], she was not dismissed for any race-based purpose. She was dismissed based on her educational background. I don't like to keep social workers. [¶] She's got a master in social work. She worked in the jail, yes, but she worked in the, probably in the psych unit as a sociologist of some sort. I don't have any other social workers up on the panel. And if I had my choice, I wouldn't have any. [¶] So that was my reason for dismissing her."

Defense counsel took issue only with the prosecutor's stated reason for removing juror J. Defense counsel argued that removing juror J. for "some educational or occupational reason . . . [was] offensive and in itself invidious discrimination." The court noted that no one had objected to defense counsel exercising his peremptory challenges to remove all potential jurors with law enforcement experience. In denying the motion, the court stated, "in view of the fact [the prosecutor] has mentioned that social worker degree, which [has] absolutely nothing to do with her race, I am going to deny the *Wheeler* motion."

Analysis

Initially, we note that the trial court did not expressly find that defense counsel had made a prima facie showing. But the trial court determined the prosecutor's reasons were race-neutral so the issue of defendant's showing is moot. (*Ward*, *supra*, 36 Cal.4th at p. 200, citing *Hernandez v. New York* (1991) 500 U.S. 352, 359 [114 L.Ed.2d 395, 405].)

Defendant claims that juror S., who was not African-American, had had several negative experiences with law enforcement but was allowed to remain on the jury. Even so, defendant claims that the prosecutor's reason for exercising his peremptory

right to excuse juror S. is not supported by the record since prospective juror S. stated that he did not judge all law enforcement officers based on the behavior of one and that he had friends who were officers and regularly socialized with a retired couple who had been deputy sheriffs.

The prosecutor stated a nondiscriminatory reason for exercising his peremptory challenge to remove juror S. Juror S. stated that he had been stopped numerous times based on his race and age and considered it harassment. Peremptory challenges based on a negative experience with law enforcement is a proper race-neutral reason. (*People v. Turner* (1994) 8 Cal.4th 137, 171.)

Prospective juror S.'s negative experiences are not comparable to juror 8's experiences. Juror 8 explained he had been stopped once by law enforcement officers, "Well, I got stopped in Illinois, and I really feel it was a scam. They were watching for Californians. I think it was a setup. [¶] They had a school bus going down the freeway, and it stops right in the middle of the freeway. And just as you get ready to pass it, flops out the stop sign. Then right away, there's a patrolman on your tail. And you[re] from out of state, so they let you off with an $80 payoff because they know you're on your way home. . . . [¶] . . . I'm sure it was a setup." He said that he believed "the California plates had something to do with it." Juror 8 had been the victim of a car burglary and was disappointed that law enforcement had not done a thorough investigation.

Juror 8's negative experience out of state and the car burglary is not comparable to juror S.'s 14 years of perceived harassment by law enforcement based in part on race.

The Attorney General notes another juror who claimed he would be fair was removed by the prosecutor. Juror C. had been assaulted by a Roseville police officer in 2002 and filed a civil suit against him. Juror C. had three pending criminal charges against him for the same instance. Juror C. claimed he harbored no animosity towards law

enforcement. The prosecutor exercised his third peremptory challenge to remove prospective juror C.

Defendant claims that when the prosecutor was concerned with the educational or occupational backgrounds of other jurors, who defendant claims are Caucasian, the prosecutor asked several questions but asked none of prospective juror J. Defendant notes that the prosecutor questioned a prospective juror concerning his undergraduate degree in bio-chemistry and graduate degree in environmental engineering and two other jurors about their law degrees and positions. Defendant claims that although prospective juror J. had a master's degree in social work, she had not pursued a career in social work and instead had worked in property management for "18 years."

The prosecutor stated a nondiscriminatory reason for exercising his peremptory challenge to remove juror J. Juror J. had a master's degree in social work and had an internship in the psychiatric department of the "branch" which the prosecutor and defense counsel interpreted as the jail. Peremptory challenges based on experience in social services is a proper race-neutral reason. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 411; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315; see also *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791; *People v. Barber* (1988) 200 Cal.App.3d 378, 394.)

Prospective juror J.'s educational background in social work is simply not comparable to the jurors with backgrounds in law, bio-chemistry or environmental engineering. The prosecutor focused on her internship experience in the psychiatric unit, presumably the jail. Defendant's statement that juror J. had been employed in property management for 18 years is not supported by the record. She stated she had lived in the Greenhaven area for 18 years.

Moreover, the jury included an African-American. "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in

exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.' [Citation.]" (*Ward*, *supra*, 36 Cal.4th at p. 203.) When defendant made his *Wheeler* objection, the trial court noted that the jury included another African-American after the prosecutor excused jurors S. and J. That juror's name is redacted in the reporter's transcript which means that juror sat on the jury (Cal. Rules of Court, rule 31.3 (b)(1), (c)). Defendant challenges the reliance upon only record redaction to support this fact. He has cited nothing in the record to suggest otherwise. He simply argues that "[n]either counsel nor the court ever state[d] that the redacted juror sat on the jury." We are not persuaded.

Defendant has failed to demonstrate that the prosecutor improperly exercised his peremptory challenges. We reject defendant's contention that the trial court erroneously denied his *Wheeler-Batson* motion.

II

Defendant contends the trial court violated his constitutional rights by admitting evidence of his prior sex crime pursuant to Evidence Code section 1108. He argues Evidence Code section 1108 is unconstitutional, violating his federal constitutional right to due process.[2] Even assuming the statute is constitutional, he argues the jury was erroneously instructed that it could "rely exclusively on this evidence to convict . . . ." He further argues reversal is required because the jury was allowed to convict on predisposition evidence proved by a preponderance of the evidence. We reject defendant's contention.

Over defense objection based on remoteness, similarity and Evidence Code section 352, the trial court granted the prosecutor's in limine motion to

---

[2] Defendant also cites but does not discuss his rights to confrontation and a fair trial. We likewise will not discuss the impact upon such rights.

introduce evidence of defendant's prior 1984 conviction for sexual assault of Linda H. pursuant to Evidence Code section 1108 and *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*).[3]

On February 17, 1984, defendant broke into Linda H.'s apartment through a kitchen window, entered her bedroom and, holding a straight edge razor, jumped on her while she was asleep in bed. When she yelled and tried to fight back, he slapped her in the face and threatened to kill her if she did not shut up. He said, "I came here to eat your pussy," and unzipped his pants. H. fought back harder. Defendant bit her below her breast. Her son opened her bedroom door and turned on the light. Defendant ran out of the apartment through the front door. H. had numerous bruises on her body. Defendant's sister lived next door in the same apartment complex. Defendant's palm print was recovered from the kitchen window and the wall nearby. When interviewed by an officer and asked whether he knew why, defendant stated he thought it was about a rape. He admitted knowing H. and claimed he had been in her apartment four or five times, including her bedroom once and kitchen. He

---

[3] Evidence Code section 1108 provides in relevant part, as follows:

"(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

[¶] . . . [¶]

"(d) As used in this section, the following definitions shall apply:

"(1) 'Sexual offense' means a crime under the law of a state or of the United States that involved any of the following:

[¶] . . . [¶]

"(B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem."

claimed he was with Tiny the night of the sexual assault. When told his prints were found at H.'s apartment, he asked "Where at?"

The trial court instructed the jury in the language of CALJIC Nos. 2.50.01 [evidence of other sexual offenses], 2.50.2 [definition of preponderance of the evidence], 9.09 [assault with intent to commit certain felonies] and 9.00 [assault--defined].[4]

---

[4] The trial court instructed as follows: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case. Sexual offense means a crime under the laws of a state or of the United States that involves any of the following: That is any conduct made criminal by Penal Code Section 220. The elements of this crime are set forth elsewhere in this instruction. If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is accused. However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes. You must not consider this evidence for any other purpose. [CALJIC No. 2.50.01]

"Preponderance of the evidence means evidence that was more -- that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. You should consider all the evidence bearing upon every issue regardless of who produced it. [CALJIC No. 2.50.2]

(continued...)

Defendant recognizes that *Falsetta* rejected the argument that admission of propensity evidence pursuant to Evidence Code section 1108 violates a defendant's constitutional right to due process. He claims *Falsetta* was wrongly decided and raises the issue to preserve his right to further review. We are bound by *Falsetta* (*Auto Equity Sales, Inc. v. Superior*

(...continued)

"Every person who assaults another with the specific intent to commit forcible oral copulation is guilty of the crime of assault to commit forcible oral copulation in violation of Penal Code Section 220. In order to prove this crime, each of the following elements must be proved: One, a person was assaulted; and, two, the assault was made with the specific intent to commit forcible oral copulation. The crime of assault with intent to commit forcible oral copulation is complete if the assault is made and at any moment during the assault the aggressor intends to commit forcible oral copulation upon the person assaulted. [CALJIC No. 9.09]

"In order to prove an assault, each of the following elements must be proved: One, a person willfully and unlawfully committed an act which by its nature would probably and directly result in the application of physical force on another person; the person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and three, at the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another. The word willfully means the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person or an actual awareness of the risk that might occur to another person. To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted, it may be considered in connection with other evidence in determining whether an assault was committed and, if so, the nature of the assault. [CALJIC No. 9.00]"

Court (1962) 57 Cal.2d 450 (*Auto Equity Sales*)) and accordingly reject this argument.

Defendant next argues that the trial court erroneously instructed the jury that it could rely "exclusively" or solely on this evidence to convict. We reject this argument.

In *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), the California Supreme Court rejected the argument that CALJIC No. 2.50.01 (1999 rev.) as modified, could have been "interpreted to authorize a guilty verdict based solely on proof of uncharged conduct" or that a "juror could reasonably interpret the instructions to authorize conviction of a charged offense based solely on proof of an uncharged sexual offense." (*Id.* at pp. 1013, 1015.) *In People v. Pescador* (2004) 119 Cal.App.4th 252 (*Pescador*), this court rejected a challenge to jury instructions similar to those in *Reliford* [CALJIC No. 2.50.02 (2000 rev.) and CALJIC No. 2.50.2] in a case involving prior acts of domestic violence evidence (Evid. Code, § 1109), relying on *Reliford* and concluding that there was no risk that the jury could convict based on disposition alone because the jury was so instructed. (*Pescador, supra*, 119 Cal.App.4th at pp. 258-262.)

Defendant argues *Pescador* should be reconsidered and that *Reliford* did not consider the issue presented in *Pescador* and the issue presented here. *Reliford* held that the instructions did not lessen the prosecution's burden of proof. (*Reliford, supra*, 29 Cal.4th at pp. 1015-1016.) The instruction here is significantly different than those before *Reliford* and *Pescador*, including the statement, "If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes." The jury here was instructed that the prior conviction alone was insufficient to prove the charged offense. We reject defendant's arguments.

Finally, defendant argues reversal is required because the jury was allowed to convict on disposition

evidence proved by a preponderance of the evidence. Defendant claims the instructions allowed the jury to infer guilt of the charged offense based on proof of the predicate fact, that is, the prior conduct, as long as it was proven by a preponderance of the evidence. As defendant recognizes, *Reliford* rejected this claim as do we. (*Auto Equity Sales, supra*, 57 Cal.2d 450.)

We note an error in preparation of the abstract of judgment. Defendant was convicted in count fourteen of violating section 288a, subdivision (c)(2), not section 289, subdivision (a)(1). We will order the abstract corrected accordingly.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment reflecting that defendant was convicted of violating Penal Code section 288a, subdivision (c)(2) in count fourteen and to forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed.

BLEASE , Acting P. J.

We concur:

ROBIE , J.

BUTZ , J.

SUPREME COURT
FILED
AUG 30 2006

Frederick K. Ohlrich Clerk

Deputy

Court of Appeal, Third Appellate District-
No. C048079
S145276

IN THE SUPREME COURT OF CALIFORNIA

En Banc

==========

THE PEOPLE, Plaintiff and Respondent,

v.

STEVEN FRANK JACKSON, Defendant and Appellant.

==========

Petition for review DENIED.

FILED

SEP 03 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN FRANK JACKSON, Petitioner-Appellant, v. T. FELKNER, Respondent-Appellee.	No. 09-15379 D.C. No. 2:07-cv-00555-RJB Eastern District of California, Sacramento ORDER

Before: SCHROEDER and RAWLINSON, Circuit Judges, and COLLINS, District Judge.*

The panel has voted to deny the Petition for Rehearing. Judges Schroeder and Rawlinson voted, and Judge Collins recommended, to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc, and no judge of the court has requested a vote.

Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc filed on August 4, 2010, is DENIED.

OPPOSITION BRIEF

No. 10-797

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

T. FELKNER, *Petitioner,*

v.

STEVEN FRANK JACKSON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION
TO STATE'S PETITION FOR WRIT OF CERTIORARI

MARK D. EIBERT
Post Office Box 1126
Half Moon Bay, CA 94019-1126
Telephone: (650) 638-2380
Fax: (650) 712-8877

Counsel of record for Respondent
STEVEN FRANK JACKSON

QUESTIONS PRESENTED

1. Whether in an unpublished decision that is has no precedential value, the Ninth Circuit correctly and adequately decided that under the unique facts of this case, and based in part on the factual comparisons of comparative juror analysis, the state court decision was contrary to, or involved an unreasonable application of, clearly established Federal law because the prosecutor's proffered race-neutral bases for peremptorily striking two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of [a possible] three prospective African-American jurors were stricken, and the record reflected [factually] different treatment of comparably situated jurors.

2. Whether any of the justifications for granting certiorari under Supreme Court Rule 10 or other authorities applies in the case at bar.

TABLE OF CONTENTS

THE QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. PRAYER FOR RELIEF 1

II. OPINION BELOW 1

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

IV. STATEMENT OF THE CASE 3

V. REASONS SUPPORTING DENIAL OF THE WRIT 13

VI. CONCLUSION 30

APPENDIX A: UNPUBLISHED MEMORANDUM OPINION OF THE NINTH CIRCUIT COURT OF APPEALS, JULY 23, 2010

APPENDIX B: NINTH CIRCUIT ORDER DENYING STATE'S PETITION FOR PANEL REHEARING AND/OR REHEARING EN BANC, SEPTEMBER 3, 2010

TABLE OF AUTHORITIES

Cases **Pages**

Ali v. Hickman, 2009 U.S.App.LEXIS 14848 (9th Cir.), *as amended*, 571 F.3d 902 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1065 (2010).....13, 20, 27, 28, 29

Batson v. Kentucky, 476 U.S. 79 (1986).....passim

Boyd v. Newland, 467 F.3d 1139 (9th Cir. 2006), cert. denied, 127 S.Ct. 2249 (2007).....13, 19, 20, 21, 26

Cooperwood v. Cambra, 245 F.3d 1042 (9th Cir. 2001).....18

Jackson v. Felkner, No. 09-15379 (9th Cir. July 23, 2010).....passim

Johnson v. California, 545 U.S. 162 (2005).....25

McLain v. Prunty, 217 F.3d 1209 (9th Cir. 2000).....21

Miller-El v. Cockrell, 537 U.S. 322 (2003)("Miller-El I").....21, 24

Miller-El v. Dretke 545 U.S. 231 (2005)("Miller-El II").....13, 19, 21, 26

Paulino v. Castro, 371 F.3d 1083 (9th Cir. 2004).....25

People v. Ward, 36 Cal.4th 186 (2005).....19

Rice v. Collins, 546 U.S. 333 (2006).....29

Rivera v. Nibco, 372 Fed. Appx. 757 (9th Cir. 2010), *cert. denied*, 2011 U.S. LEXIS 402 (Jan. 10, 2011).....30

United States v. Battle, 836 F.2d 1084 (8th Cir. 1987).....9, 17

United States v. Collins, 551 F.3d 914 (9th Cir. 2009).....20

United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987).....9, 17

United States v. Vasquez-Lopez, 22 F.3d 900 (9th Cir. 1994).....9, 17

Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000).....28

Statutes

28 U.S.C. § 2254.....28

Other Authorities

Supreme Court Rule 10.....14, 15, 29

Ninth Circuit Rule 36-3.....2

Audio of oral argument in this case, www.ca9.uscourts.gov.....12, 16

I. PRAYER FOR RELIEF

Respondent Steven Frank Jackson respectfully asks that the State's petition for a writ of certiorari to the U. S. Court of Appeals for the Ninth Circuit be denied. The basis of the denial of this petition is that the Ninth Circuit in an unpublished opinion that has no precedential value correctly and adequately decided that under the unique facts of this case, and based in part on the factual comparisons of comparative juror analysis, that the state court decision was contrary to, or involved an unreasonable application of, clearly established Federal law because the prosecutor's proffered race-neutral bases for peremptorily striking two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of [a possible] three prospective African American jurors were stricken, and the record reflected [factually] different treatment of comparably situated jurors.

In addition, as discussed at greater length below, *none* of the considerations that support granting the writ listed in Supreme Court Rule 10 or any other authority exists.

II. OPINION BELOW

On July 23, 2010, a *unanimous* three judge Ninth Circuit panel entered judgment in an order that was final and *unreported*, reversing and remanding the district court's denial of Mr. Jackson's habeas petition. *Steven Frank Jackson v. T. Felkner*, No. 09-15379 (9th Cir. July 23, 2010), *Appendix A*.

As noted in the first footnote of the unreported opinion, "*[t]his disposition is*

not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3." (emphasis added). Ninth Circuit Rule 36-3, in turn provides as follows:

> (a) Not Precedent. *Unpublished dispositions and orders of this Court are not precedent*, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

Appendix A at 1 (emphasis added). The state court decisions below are also unreported.

The State subsequently sought panel rehearing and rehearing en banc. On September 3, 2010, the Ninth Circuit issued an Order stating that the panel had unanimously agreed to deny panel rehearing, and that "[t]he full court has been advised of the Suggestion for Rehearing En Banc, and *no judge of the court* has requested a vote." *Appendix B* (emphasis added). Both petitions were denied. *Id.*

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9 of the United States Constitution provides in pertinent part:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law....

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV. STATEMENT OF THE CASE

A. Facts Material to the Questions Presented

Facts Of The Underlying Case

This is a case of an African American man who was sentenced to a determinate state prison sentence of 10 years plus an indeterminate sentence of 300 years to life for allegedly raping a white woman.

The alleged victim was an elderly white woman who lived alone. At about 4:20 in the morning, an African American man allegedly entered her apartment through a window, pretended that a piece of wood he had was a gun, and raped her. Although the alleged victim spent about an hour at close quarters with her assailant and there was light coming into the bedroom from the porch light at the time, she was unable to positively identify Mr. Jackson as her assailant in a photo lineup, at the preliminary hearing, or at trial, and in fact at one point she identified another man as her likely assailant. *See, e.g.*, RT 92:251.

The evidence at trial consisted mostly of evidence that Mr. Jackson's DNA was found on the alleged victim's breast, which was hotly contested by a defense attorney who specialized in DNA evidence, plus evidence that Mr. Jackson had allegedly attempted to commit an unrelated sexual crime 20 years earlier.

The prosecution broke down the sexual assault into ten separate counts of rape (one for each presumed penile penetration, based on the victim's best guess), one for each alleged digital penetration, one for forcible oral copulation, and one for sexual battery, all based on the same incident. Mr. Jackson was convicted by the

jury on all counts, and based on that plus his prior convictions, he was sentenced under California's "three strikes" law to mostly consecutive prison terms totaling 310 years to life. ER 3-4.

Facts Relating To The *Batson* Claim

As noted above, in this case an African American man was charged with raping an elderly white woman. CT 11-25. The trial court recognized that race was an issue, telling prospective jurors that "the complaining witness and the defendant are from different racial backgrounds." ART 55. The Court also recognized that "it is apparent that the defendant has a different racial background than many of the jurors." ART 55. However, there were two African American jurors in the jury panel: Darrell Smith and Lola Johnson. ER 50-51. During voir dire, the prosecutor peremptorily dismissed both of them. ART 103, 200.

The trial court questioned prospective jurors on their attitudes and experiences regarding both race and police:

> "Have any of you had any negative encounters with law enforcement? This wouldn't necessarily relate to the racial issue, but negative encounters with law enforcement as that it left a negative impression in your mind? This could be something as simple a traffic ticket where you felt you were unfairly treated."

ER 59-60. Two prospective jurors felt they had been treated unfairly by police: Darrell Smith and Juror 8. Mr. Smith is African American. ER 59-60. He explained that between the ages of 16 and 30 he had been stopped by police "a lot" because of his race and age. ER 60-61. He indicated, however, that none of these experiences "stuck out in [his] mind" and that it was not a "big thing." ER 61. He

also indicated that there was nothing that caused him to think he couldn't be a fair juror to both sides. ART 59-60.

Mr. Smith also explained that it had been over 20 years since he had last been stopped by police. ER 65. Now, Mr. Smith had "a lot of friends and former students . . . in law enforcement," and he regularly socialized with retired police officers. ER 56-58, 66. He also told the prosecutor that he did not "judge all police officers by the behavior of one" and that he was "willing to judge each [witness] on their own credibility." ER 66. He did *not* indicate when asked that he would be biased or prejudiced in any way, or unable to give Mr. Jackson or the State a fair trial. See ART 11-12. In spite of these answers, the prosecutor used a peremptory challenge to kick Mr. Smith off the jury. ART 103; CT 113.

Prospective Juror 8, who was not African American, had also had several negative experiences with police. Juror 8 explained that during a trip to Illinois, he/she had been stopped by police, who asked Juror 8 for $80.00 not to give him or her a ticket. ER 59-60. Juror 8 believed it was a scam because Juror 8 was driving a car with California license plates, and felt discriminated against for being a Californian. Id. When the trial court asked Juror 8 whether he/she could "set aside that experience," he/she replied "I'm not mad anymore. It's okay." Id.

Juror 8 also told the court that he/she was the victim of a burglary. ART 26, ER 62-63. The police refused to investigate because there were no witnesses and the value of the property stolen was below $1,000. ART 27, ER 63. This made Juror 8 "damn mad." ER 63. Juror 8 was "disappointed [in the police] but . . . got

over it." Id. The prosecutor did not discharge Juror 8, and he or she sat on the jury. CT 113, 115.

In short, both Mr. Smith and Juror 8 were questioned about their contacts with law enforcement. Both explained that they had several negative experiences with police officers in their pasts, and both thought that they had been discriminated against by those police officers, but both also said that those experiences would not affect their ability to fairly decide the case. ER 59-61, 63, 66. The prosecutor struck prospective juror Mr. Smith but allowed Juror 8 to remain on the jury; the only real difference between them was that Mr. Smith was African American and Juror 8 was not. CT 113.

The trial court also questioned prospective jurors about their education and occupation. Several jurors who were not African American had backgrounds that led to more probing questioning. For example, after several prospective jurors said they were attorneys, the prosecutor asked questions designed to ensure that they would follow the law as given to them and not use any outside legal knowledge or resources. ART 196-199. One juror who was not African American said he had a background in science and statistics, and because the case would involve hotly contested DNA evidence, the prosecutor asked questions which ensured that the juror would decide the case based only on the evidence presented. ART 174-175.

When the trial court questioned prospective juror Lola Johnson, an African American, she explained that she worked in property management and had lived in the Greenhaven area for the last 18 years. ER 67. She also explained that in 1992,

while working on a graduate degree in social work, she had completed a 9-month internship in the psychiatric department (presumably of the county jail). ER 50-54, 67. Ms. Johnson told the court that nothing about this experience, however, would "reflect on [her] ability to be a fair juror." ER 68.

The prosecutor asked probing questions of non-African American jurors to determine if there was a problem with their educational background. See ART 174-175, 196-199. However, the prosecutor did not ask Ms. Johnson a single question about her educational background, about her social work degree, or about her internship (presumably) at the county jail. ART 177-200. In fact, Ms. Johnson did not raise her hand when asked if she would not vote guilty if the case were proved to her beyond a reasonable doubt. ATT 199. Instead, the prosecutor used a peremptory challenge to dismiss her. ART 200.

Defense counsel made a motion under Batson v. Kentucky, 476 U.S. 79 (1986), pointing out that Mr. Smith and Ms. Johnson were both African American. ER 50-51. The trial court required the prosecutor to respond. ER 51.

The prosecutor said that he was concerned that Mr. Smith may "still harbor animosity" toward police because of his "history with law enforcement . . . [stopping] him for no reason." ER 52. Moreover, the prosecutor had passed twice on the jury when Mr. Smith was in the jury box and had defense counsel also passed Mr. Smith would have been on the jury—which the prosecutor apparently considered undesirable. ER 51.

This explanation was clearly pretextual. It had been over 20 years since Mr. Smith had been stopped by police and he now regularly socialized with retired police and sheriffs' officers. ER 56-57, 66. Several of his good friends and former students were in law enforcement. ER 66. And Mr. Smith indicated that his history with police would not affect his ability to be fair and assess the credibility of witnesses on an individual basis. ER 58, 60-61, 66. Moreover, Juror 8 -- who was not African-American -- had also had several negative experiences with police. ER 60, 62-63. Yet the prosecutor did not dismiss Juror 8 for this identical reason and Juror 8 ultimately sat on the jury.

As to Ms. Johnson, the prosecutor stated that he challenged her "based on her educational background . . . in social work." ER 52. As noted above, the prosecutor had not asked Ms. Johnson a single question about her degree in social work, or whether it would it would affect her ability to be a fair juror in this case. ER 67-68, ART 188-200. Moreover, Ms. Johnson had apparently not even pursued a career in social work and instead now worked in property management. ER 51, 53, 67. However, there were several non-African American jurors who also had backgrounds which concerned the prosecutor. As noted above, the prosecutor asked these jurors further questions to learn how their background would affect their ability to decide the case. ART 174-175, 196-99. The prosecutor, however, did *not* treat Ms. Johnson this same way.

The trial court denied defense counsel's *Batson* motion. ER 54. Mentioning only the prosecutor's proffered reason for dismissing Ms. Johnson, the court found

that because the prosecutor "mentioned that social worker degree, which has absolutely nothing to do with her race, I am going to deny the *Wheeler/Batson* motion." ER 54.[1]

---

[1] The parties below disagreed on whether these two were the only African American prospective jurors, or whether a third African American actually sat on the jury. The record does not clearly reflect the correct answer, but the state courts inferred that a third African American did sit on the jury because during voir dire (before jury selection was completed), the judge referred to another juror whose name was redacted, which would be a common thing for court reporters to do with sitting jurors. See ER 51. This single word in the transcript is hardly conclusive evidence of a third African American juror actually ultimately sitting, however. Moreover, it is unconstitutional to exclude even one juror based on race, regardless of whether others of the same race ultimately sit on the jury. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987). At oral argument, counsel discussed and the Panel recognized this factual dispute, but apparently chose to give the government the benefit of the doubt in its written opinion. This note is pursuant to Supreme Court Rule 15.2, which states:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

Undersigned counsel hereby considers the State's repeated statements that the prosecutor "accepted the jury with the third African-American juror in the box" or that "two out of three" African American jurors were stricken or did not serve to be misstatements, while recognizing that the Panel gave the State the benefit of the doubt in its unpublished written ruling.

Similarly, Respondent considers it a "misstatement" within the meaning of Supreme Court Rule 15.2 when the State at page 4 of its Petition argues that "[d]efense counsel did not take issue with the prosecutor's stated reason for challenging Mr. S." Defense counsel mentioned both struck jurors in his *Batson/Wheeler* motion, the trial court addressed them both, and the trial

The California Court of Appeal denied this *Batson* claim on direct review, opining in a very conclusory way that "Juror S's negative experience out of state and the car burglary is not comparable to juror [Smith's] 14 years of perceived harassment by law enforcement based in part on race." ER 32. Similarly, the California Court of Appeal opined that prospective juror Johnson's "educational background in social work is simply not comparable to the jurors with backgrounds in law, bio-chemistry or environmental engineering." ER 33.

The California court also relied on the factually weak and legally irrelevant assumption that a third African American actually sat on the jury. ER 34.

The district court basically, and in an equally conclusory way, just cited to the state court's opinion and agreed that the state court's conclusions were "reasonable, based upon the record." ER 18.[2]

At oral argument in the Ninth Circuit, the Panel asked numerous factual questions about the voir dire, the peremptory exclusion by the prosecutor of the two African American jurors, the statistical issue of the number and percentage of African American jurors that the prosecutor excluded, and about comparative juror analysis between those excluded by the prosecutor and those non-minority jurors that the prosecutor allowed to sit on the jury. Among other things, the prosecutor at oral argument stated that one of the struck jurors had negative experiences with

---

prosecutor gave his explanations for striking both prospective African-American jurors. ER 50-52. Although Ms. J was discussed at greater length in the trial court, both were also certainly at issue in the Ninth Circuit appeal.

2 The district court also cited facts from the voir dire transcript that were not offered as justifications by the prosecutor. As discussed below, that is improper.

law enforcement "that had a bearing on this particular case." One Panel member responded "because of his race, right?" The prosecutor responded that the juror said that law enforcement acted in a racially motivated way. A Panel member asked if the prospective juror said he could put that aside, and judge the case fairly, why would he be pre-empted if it's not race based at that point? The prosecutor said that a different juror said something similar and was struck. A Panel member responded that the other juror, who was in a current lawsuit with the police, was different from someone who was stopped 16 years ago by the police and said he could put it aside. The prosecutor added that the excluded juror experienced law enforcement acting in a racially motivated way, here we have an African American defendant and white law enforcement, it will be hard for him to set that aside. A Panel member noted that is a common occurrence for African Americans, and it has been documented that African Americans are pulled over and questioned more by the police, so are you saying that African Americans per se would be biased whenever there is an accusation of racial profiling or things of that nature? The prosecutor said no, but it happened often to this person and he used the term "harassed." A Panel member responded that there was no record made that his experiences caused him to be biased against white police officers or law enforcement generally, that if there had been such a record it would be more persuasive, but to simply assume that the prospective juror wouldn't be objective even though he said he would be and to exercise a peremptory challenge against him when the same prosecutor did not do it against a non-African American who also felt harassed by

the police was a little "suspicious." The prosecutor argued that the struck juror said he was harassed often and even though he said he could be fair and impartial the trial prosecutor could look at that and say that even though he says he can be fair and impartial "I don't know what's gonna happen where there is an African American defendant and white law enforcement and the testimony starts coming out and bringing out all these feelings..." A second Panel member said "sounds like you struck [or strike] him because of his race." A different Panel member immediately added "yeah." A third Panel member told the prosecutor that "I'm not sure you're helping [your case]."

The Panel also noted that the fact that 2 out of 2 or 2 out of 3 African American jurors had been struck made it even more difficult to argue that the strikes were race neutral and not pretextual.

The above summary of certain relevant portions of oral argument is taken from counsel's notes and listening to the audio tape; no official transcript of the entire oral argument exists to counsel's knowledge. However, the oral argument lasted only about 20 minutes, and can still be listened to on the Ninth Circuit's website. Respondent strongly urges that if this Court has any remaining doubts about granting certiorari, that it listen to the tape of the oral argument found at www.ca9.uscourts.gov (use "advanced search" and type in the case number, 09-15379, to call up the short audio tape). The numerous, searching, and mostly fact-based questions asked by the Panel, and the answers *and concessions* of racial discrimination in the peremptory challenges made by the prosecutor at oral

argument, will help this Court to understand the reasons for the Panel's decision.

In short, the Ninth Circuit Panel carefully examined the facts and the law, recognizing that "[i]n evaluating pretext, our precedent requires a comparative juror analysis. *See Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005))." The Panel unanimously concluded that "[t]he prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors. *See Ali [v. Hickman,]* 584 F.3d [1174,] at 1180 [(9th Cir. 2009), *as amended*,](holding under similar circumstances that the California Court of Appeal's finding of no pretext was unreasonable). Therefore, we reverse the district court's denial of [Mr.] Jackson's petition for writ of habeas corpus." *Appendix A* at 2. Their decision was reasoned and almost entirely fact-based. There is no evidence whatsoever that the Panel, or the entire Ninth Circuit in unanimously denying rehearing en banc, failed to give any due deference to the state court opinion or misunderstood or ignored any aspect of federal law.

V. REASONS SUPPORTING DENIAL OF THE WRIT

A. General Considerations Governing Certiorari

The State's entire argument is that the Ninth Circuit's unpublished, non-precedential Memorandum Disposition did not give adequate deference to the lower

courts' rulings. There is no evidence whatsoever in the record to support that bald accusation. The Panel decided, after full briefing and oral argument and a thorough review of the record (including comparative juror analysis), that the state court's finding of no racial pretext in the peremptory challenges of two African-American jurors by a prosecutor in a trial of an African-American man for raping a white woman, was objectively unreasonable based on the evidence of this specific case. What the State is really complaining about is that it does not like the way the Panel wrote its unpublished Memorandum Decision. That the losing party dislikes how the opinion is written is not a basis for granting certiorari, and the State has offered no authority, and certainly no split of authority, to support its argument that it is. And every single Judge of the Ninth Circuit rejected that argument when not one Judge voted to rehear the matter en banc.

The fact that this case is unpublished and has no precedential value, and essentially turns on the specific facts of this case—and will therefore neither affect other cases nor prevent the Ninth Circuit from reaching a different conclusion on the same or similar issues in other, published cases in the future—make this case unworthy of the Supreme Court's attention. Only the parties to this case are affected, and *they* still have the option of a retrial—at the State's sole discretion—and even possibly further state court and Ninth Circuit appeals.

Moreover, Supreme Court Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"—which is precisely

what the State is arguing here. The Ninth Circuit's unpublished Memorandum Decision was based in part on that Court's weighing of the *evidence* and finding that the lower court's finding of no racial pretext was unreasonable. *Appendix A* at 2. This Court seldom wastes its time on cases where the losing party simply wishes to quibble over the factual determinations of the case below—again, that is what the State is attempting here by arguing that the Ninth Circuit's alleged "factual findings" were incorrect.

Supreme Court Rule 10 also lists the primary grounds for granting a writ of certiorari—circuit splits, state-federal court splits, state-state court splits, "far depart[ures] from the accepted and usual course of judicial proceedings," or "an important question of federal law that has not been, but should be, settled by [the Supreme] Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court." *None* of these accurately describes the State's complaint about the Ninth Circuit's unpublished opinion, nor does it meet its burden of showing, that this petition for writ of certiorari fits into any of those categories. There simply is no lack of uniformity on issues of federal law, no conflict with other circuits, no splits of authority (other than between the Ninth Circuit's unpublished decision and the unpublished decisions of the district and intermediate state court below in the case at bar), and no conflict within the Ninth Circuit (which should be resolved by the en banc Ninth Circuit even if it existed, which the State does not demonstrate). Indeed, a review of the State's petition for writ of certiorari makes clear that what the State really wants to do is

to *rehash its factual arguments*.

As for the State's attempt to turn this into a case about what amount of "deference" is due to the state courts' rulings, that issue was not even addressed by the Ninth Circuit below—although the proper amount of deference was given.

In addition, as discussed in more detail below, this Court has recently and repeatedly denied certiorari in what the State claims are similar cases, and there is no reason to do the opposite here. And even if there were, the State itself complains about what it considers a similar case that preceded this one that it could still seek certiorari on—if it wishes to do so.

Moreover, this case is not even about "letting a rapist go." If the Ninth Circuit decision stands, the State will be able to retry him. Even if the State chooses in its discretion not to do so, he has already been in prison *since 2004—seven years*—based on a trial that the federal Court of Appeals found unconstitutional due to racial discrimination. Delay in enforcing the Court of Appeals' judgment appears to be the primary purpose of this petition.

And in any event, as discussed in more detail below, this case was correctly decided on the merits even without reference to the "issues" the State attempts to manufacture in order to get this Court's attention on certiorari.

Finally, Respondent once again urges this Court to listen to the tape of the oral argument found at www.ca9.uscourts.gov (use "advanced search" and type in the case number, 09-15379, to call up the audio tape). That tape may greatly help this Court to understand the Panel's decision.

B. The Legal Merits

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the U.S. Supreme Court denounced the use of prosecutorial peremptory challenges to eliminate African American jurors because of their race as "most pernicious," and declared that such exclusions violate the equal protection clause because it "constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 84, 85, 88. Numerous Circuits have has held that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *accord United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987) ("under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors"); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987) (same).

The Batson process involves three steps: (1) a defendant must make a prima facie showing that the prosecutor challenged the juror because of membership in a cognizable group; (2) the burden then shifts to the prosecutor to put forward a group-neutral reason for challenging the juror, and (3) the court must then determine whether the defendant has established purposeful discrimination, in other words, whether the group-neutral explanation given by the prosecutor is real or pretextual. As for the *first* prong,

> To establish such a [prima facie] case, the defendant first must

> show that he is a member of a cognizable racial group, *Castaneda v. Partida, supra*, at 494, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. ***Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."*** *Avery v. Georgia*, *345 U.S., at 562*. Finally, the defendant must show that *these facts and any other relevant circumstances* raise ***an inference*** that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This *combination of factors* in the empaneling of the petit jury, as in the selection of the venire, raises the necessary ***inference*** of purposeful discrimination.
>
> In deciding whether the defendant has made the requisite showing, the trial court should consider *all relevant circumstances*. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an ***inference*** of discrimination. Similarly, ***the prosecutor's questions and statements during voir dire*** examination and in exercising his challenges [regarding other jurors] may support or refute an inference of discriminatory purpose. *These examples are merely illustrative.*

Batson, 476 U.S. at 96-97 (emphasis added).

Thus, in order to establish a prima facie case of racial discrimination in jury selection, a defendant must show that (1) the prospective juror who was removed is a member of a cognizable group, (2) the prosecution exercised a peremptory challenge to remove the juror, and (3) 'the facts *and any other relevant circumstances* ***raise an inference***' that the challenge was motivated by race or gender." *Cooperwood v. Cambra*, 245 F.3d 1042, 1045-46 (9th Cir. 2001)(emphasis added). The first two prongs of this test could not reasonably be disputed: both of the prospective jurors and Mr. Jackson are all African American, and the prosecutor used a peremptory strike against both of those prospective jurors.

As for the third prong, the California Court of Appeal decided that because the trial court asked the prosecutor to state his reasons and determined that they were race-neutral, "the issue of the defendant's showing [of a prima facie case] is moot." ER 31. The district court similarly *assumed* that that the defendant had made a prima facie case. ER 12.

Thus, this Court can move to the next question: whether the reasons stated by the prosecutor for peremptorily striking two African American prospective jurors were in fact a pretext for discrimination.

In *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), the Supreme Court performed a detailed comparative juror analysis, explicitly rejecting the argument that such an analysis was barred because it had not been performed in state court. *Miller-El II*, 545 U.S. at 241 n. 2. *Miller-El II* makes clear that comparative juror analysis is an appropriate tool for analyzing a prosecutor's stated reasons even where that analysis was not performed at trial. Indeed, the California Supreme Court has *assumed* that it must perform comparative juror analysis on appeal even where it had not been performed in the trial court, citing *Miller-El*. *See, e.g., People v. Ward*, 36 Cal.4th 186, 203 (2005).

In *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 2249 (2007), the Ninth Circuit also concluded that

> Miller-El II made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims: "More powerful than these bare statistics [revealing that the prosecution struck 91% of black potential jurors], however, are side-by-side comparisons of some black venire panelists who were struck and

white panelists allowed to serve." 125 S. Ct. at 2325.

. . .

Miller-El II fits within the Batson framework, which provides that "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 97. *Batson* itself required courts to consider the "totality of the relevant facts" and "all relevant circumstances" surrounding the peremptory strike. *Id.* at 94, 96.

. . .

There are two main ways that we could consider Petitioner's *Batson* claim in light of the "totality of the relevant facts." *Batson*, 476 U.S. at 94.....

First, we could look at percentages....We have held that, "[t]o establish a prima facie case, [a petitioner does] not need to show that the prosecution ha[s] engaged in a pattern of discriminatory strikes against more than one prospective juror" because "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). Nonetheless, in some cases, courts have found it helpful to compare the number of minority prospective jurors stricken to non-minority prospective jurors stricken. *See Miller-El II*, 125 S. Ct. at 2325 (noting that "[t]he numbers describing the prosecution's use of peremptories are remarkable."); *Wade*, 202 F.3d at 1198 (reviewing the statistical evidence of the number of African-American potential jurors stricken compared to the racial makeup of the other potential jurors who were struck and of the pool at large, although noting that statistical disparities can be misleading).

. . .

Second, we could assess "all relevant circumstances," *Batson*, 476 U.S. at 96, surrounding the challenged peremptory strike by engaging in comparative juror analysis....In order to assess Petitioner's claim, we must compare the prospective juror who was stricken with the other prospective jurors who were not.

Id. at 1145-48; *accord United States v. Collins*, 551 F.3d 914 (9th Cir. 2009); *Ali v. Hickman*, 583 F.3d 1174 (9th Cir. 2009), *as amended*. The Ninth Circuit also concluded that "comparative juror analysis is an important tool that courts *should*

use on appeal." *Boyd*, 467 F.3d at 1149 (emphasis added).

Accordingly, comparative juror analysis is both appropriate and necessary.

Returning to the *Miller-El* line of cases and its progeny, the Supreme Court also identified two distinct ways of using comparative juror evidence in assessing whether a facially neutral reason is a pretext for discrimination. First, where a prosecutor's stated reasons for discharging "cognizable-class" jurors apply equally to jurors who are *not* members of the class (and who were *not* discharged), those reasons may be pretextual. *See Miller-El v. Cockrell*, 537 U.S. 322, 343 (2003)(*Miller-El I*); *see McLain v. Prunty*, 217 F.3d 1209, 1220-1221 (9th Cir. 2000). Second, where the prosecutor uses "disparate questioning" between "cognizable-class" jurors and jurors who are not members of the class, stated reasons for discharging "cognizable-class" jurors based on divergent views are pretextual. *Miller-El I*, 537 U.S. at 344 (if the "use of disparate questioning is determined by race . . . it is likely a justification for a strike based on the resulting divergent views would be pretextual").

Here, the prosecutor struck the two potential black jurors in a case where a black defendant was accused of raping a white woman. In response to defense counsel's *Batson* motion, the trial court required the prosecutor to state his reasons for the discharge. Thus, the question to be answered here is whether the prosecutor's stated reasons were pretexts for racial discrimination.

Employing the two types of comparative analysis, the answer here is "yes."

First, as to the statistical question, the prosecutor apparently struck 100% of

the African American prospective jurors. Even if, as the courts below assumed based on a completely inadequate record, he only struck 66.67% of the African Americans (2 out of 3) that is still an overwhelming percentage. Plus, as noted above, striking even a single prospective juror based on race violates *Batson* and the United States Constitution.3

Second, it is important to note that the voir dire of Mr. Smith and Ms. Johnson does not show *any objective* non-racial reason for the prosecutor to throw them off the jury. Unless the prosecutor blurts out an actual admission of discriminatory intent *prior* to making his *peremptory* challenge, all most defendants can *ever* show is *an apparent absence* of any reason to excuse the juror. As the Supreme Court noted in *Batson*, "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96-97. Here, a prima facie case of discrimination was made. Both excluded African American jurors indicated that they would be fair and impartial. If anything, Mr. Smith, who regularly socialized with police officers, and Ms. Johnson, who previously worked on the jail staff, would appear to be excellent jurors for the prosecution. The fact that there are no apparent non-racial reasons for dismissing those two jurors itself supports the claim of discrimination.

---

3 The California Court of Appeal opinion states that the prosecutor used his fifth peremptory challenge to exclude Mr. Smith from the jury and his twelfth peremptory challenge to exclude Ms. Johnson. The record appears to reflect only one peremptory challenge by the prosecution after Ms. Johnson. ART 203. It is not possible from the record to tell what other minority groups some of the other struck

The additional fact that they were either the only two African American jurors in the venire, or at most two out of three, in a trial of an African American man for raping a white woman, adds considerable additional weight to this evidence.

Moreover, as to Mr. Smith, the prosecutor explained that he had prior negative experiences with police and may still "harbor animosity" toward police. RT 78. Yet the prosecutor had *not* discharged a non-African American juror who also had prior negative experiences with police. ART 57, 95-96 (Juror No. 8).

Even putting aside the inexplicable difference in treatment between Mr. Smith and Juror 8, the record does not support the prosecutor's stated reasons. Contrary to the prosecutor's argument that Mr. Smith may still harbor animosity against police generally, Mr. Smith made clear that he did *not* "judge all police officers by the behavior of one." He said he would "judge each [witness] on their own credibility,*id.*, and that he had "a lot of friends and former students . . . in law enforcement." He socialized with retired police officers on a regular basis. ART 100.

As to Ms. Johnson, the prosecutor said that he struck her because she had a master's degree in social work. RT 78. But the prosecutor did not ask Ms. Johnson a single question about her degree. The prosecutor had, however, questioned several non-African American jurors about their educational and occupational backgrounds, allowing them to explain how their backgrounds would or would not affect them as jurors. ART 174-175 (prosecutor questions prospective juror on undergraduate degree in bio-chemistry, graduate degree in environmental

---

jurors may have been members of.

engineering); 196-198 (prosecutor questions prospective juror on law degree and position at public defender's office); 198-199 (prosecutor questions seated juror on law degree and occupation as attorney). "The differences in the questions posed by the prosecutors are some evidence of purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. at 344.

Counsel must point out that the state court referred to (but did not rely on) other facts, such as prospective juror Smith's occupation as a postal worker, experiences of his relatives and friends with law enforcement, and demeanor in answering one question, that the prosecutor did *not* list as one of the reasons for striking him from the jury. Similar facts were referred to (but again not relied on) by the state court about prospective juror Johnson's acquaintances who had experience with the criminal justice system. And still other such facts were cited in the State's Petition for Writ of Certiorari concerning both Juror S and Juror J at pages 2-3 of its Petition. The district court repeated some of these facts, and unlike the state court, appeared to rely on them. ER 11. This was improper.

Courts cannot speak for the trial deputy who made the peremptory challenge. Once defense counsel met his burden of showing a prima facie case of discrimination against two prospective African American jurors who had been *peremptorily* challenged, the burden shifted and the *deputy district attorney* was required to state why *he* struck those jurors. The reviewing courts' efforts to come up with reasons why the prosecutor *might* have challenged the two jurors amounts to saying that the entire universe of speculative reasons can be employed to justify

his actions, whether they came out of his mind or mouth or not, and if either the trial or appellate courts can conjure *any* non-racial reason, that will be good enough to prove that *the deputy making the challenge* was not motivated by racial bias. This would confound the entire purpose of the burden-shifting mechanism established by the Supreme Court in *Batson*.

In *Johnson v. California*, 545 U.S. 162 (2005), the Supreme Court reaffirmed that reviewing courts must base their decisions about the racial motivations of the prosecutor on the explanations the prosecutor actually gave, *not* on speculation of what the prosecutor *may* have based his peremptory challenge on:

> The Batson framework is designed to produce *actual* answers to suspicions and inferences that discrimination may have infected the jury selection process. See 476 U.S., at 97-98, and n. 20. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See Paulino v. Castro, 371 F.3d 1083, 1090 (CA9 2004)("[I]t does not matter that the prosecutor might have had good reasons...[w]hat matters is the real reason they were stricken" (emphasis deleted); Holloway v. Horn, 355 F.3d 707, 725 (CA3 2004)(speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike)....
>
> The disagreements among the state court judges who reviewed the record in this case illustrate the imprecision of relying on judicial speculation to resolve plausible claims of discrimination.

Johnson, 545 U.S. at 172-73 (emphasis added).

In *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004), the Ninth Circuit also criticized offering speculation as to why the prosecutor challenged a juror, holding that under *Batson* "it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were

stricken"—reasons that must be provided by the prosecutor. *Id.* at 1089-90.

Thus, the law is clear that any extraneous "facts" that were not offered by the trial prosecutor as reasons for his peremptory challenges are irrelevant and may not be considered in determining whether the challenges were proper.

In short, in a trial of an African American man for raping a white woman, the prosecutor did not want African Americans on the jury, and he used his peremptory challenge to get rid of all or almost all of them. His stated reasons for both strikes were hollow and pretextual, and were either unsupported by the record, equally applicable to non-African American jurors that the prosecutor allowed to sit on the jury, the result of disparate questioning, or a combination of the three. The state court's decision was therefore contrary to, and involved an unreasonable interpretation of, clearly established Supreme Court law, and that resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The Ninth Circuit was correct to grant habeas relief.

Once again, the Ninth Circuit Panel carefully examined the facts and the law, recognizing that "[i]n evaluating pretext, our precedent requires a comparative juror analysis. *See Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005))." The Panel unanimously concluded that "[t]he prosecutor's proffered race-neutral bases for peremptorily striking the two African American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-

American jurors were stricken, and the record reflected different treatment of comparably situated jurors. *See Ali [v. Hickman,]* 584 F.3d [1174,] at 1180 [(9th Cir. 2009), *as amended*] (holding under similar circumstances that the California Court of Appeal's finding of no pretext was unreasonable). Therefore, we reverse the district court's denial of [Mr.] Jackson's petition for writ of habeas corpus." *Appendix A* at 2. Their decision was reasoned and almost entirely fact-based. There is no evidence whatsoever that the Panel, or the entire Ninth Circuit in unanimously denying rehearing en banc, failed to give any due deference to the state court opinion or misunderstood or ignored any aspect of federal law.

What this Petition comes down to is that the State did not like the result, and is therefore complaining about the way the unpublished, non-precedential Memorandum Disposition was written. Why, complains the State, didn't the Ninth Circuit gives us a longer list of obviously weak reasons that we could use to attack the ruling in the Supreme Court? Why didn't it give the state court its due deference—which the State defines as *always* agreeing with the state courts? Yet the State offers not a single case that says the Court of Appeals must give them a list of straw men to knock down on further appeal or that says "deference" is a synonym for "rubber stamp." Why, oh why, the State asks, in the age of AEDPA, is it *still possible* for the federal courts to grant habeas relief on rare occasions? Hasn't the Great Writ been effectively done away with? Won't the Supreme Court please review *de novo* the alleged "factual findings" that were the basis for the Ninth Circuit's decision?

Actually, of course, under AEDPA the Ninth Circuit does not make "factual findings," it decides whether the state court proceedings "(1) resulted in a decision that was contrary to, or involved an unreasonable interpretation of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (emphasis added). This statute provides *three separate and alternative grounds* for federal habeas relief. *See, e.g., Williams v. Taylor*, 120 S.Ct. 1495, 1509 (2000). The "unreasonable application" requirement, for example, is met if the state court "identifies the correct governing legal principle from the [U.S. Supreme Court's] decisions but unreasonably applies that principle to the facts of the [particular] prisoner's case." *Williams*, 120 S.Ct. at 1520, 1521, 1523. This inquiry requires the federal court "to ask whether the state court's application of clearly established federal law was *objectively* unreasonable." *Williams*, 120 S. Ct. at 1521 (emphasis added). The Ninth Circuit did its job under AEDPA, nothing more and nothing less. This Court should not waste its time reconsidering whether the Ninth Circuit read and interpreted the factual record in an unpublished case correctly.

The State criticizes the Ninth Circuit's citation to one of its prior cases, *Ali v. Hickman*, 584 F.3d 1174 (9th Cir.), *as amended*, 571 F.3d 902 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1065 (2010), by pointing out that a petition for certiorari was filed in that case and the State argued to this Court that it was wrongly decided. What the State fails to point out is that this Court *denied* the petition for writ of

certiorari. *Cate v. Ali*, 130 S. Ct. 2065 (2010).

The State's citation to *Rice v. Collins*, 546 U.S. 333 (2006), is equally unavailing. The Ninth Circuit in the case at bar did not "rely[] merely on debatable inferences from the record as a basis for rejecting state court findings of fact." Petition at 13. The case at bar concerned a very different set of facts which, in light of the record below *and* in light of the statements and admissions by the prosecutor at oral argument (see above), compelled the conclusion that there was no permissible alternative but to reject the trial prosecutor's race-neutral justifications and conclude that a *Batson* violation had occurred.[4] The Ninth Circuit properly stated the relevant rules of law; this Court does not grant certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Supreme Court Rule 10. (Of course, there was no "error" here in the first place). Nor do any of the other grounds for granting certiorari stated in Supreme Court Rule 10 apply here.

Finally, the State seeks to portray the Ninth Circuit as running amok with numerous recent decisions improperly finding *Batson* error even though the presumably infallible state courts did not. Two of those three other cases, *Ali v. Hickman* and *Rivera v. Nibco*, were brought to this Court's attention by the State, which *denied* certiorari. *See Ali v. Hickman*, 584 F.3d 1174 (9th Cir.), *as amended*, 571 F.3d 902 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1065 (2010), and the

---

[4] Again, this Court should ignore arguments based on "facts" about the prospective jurors that the trial prosecutor himself did not give as a basis for his peremptory strikes, such as those repeated at page 13 of the Petition. *Johnson v. California*,

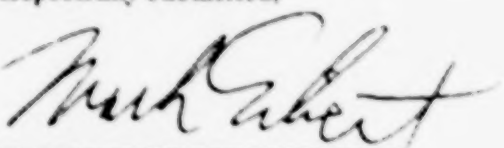
unpublished decision of *Rivera v. Nibco*, 372 Fed. Appx. 757 (9th Cir. 2010), *cert. denied*, 2011 U.S. LEXIS 402 (Jan. 10, 2011). The third case complained about by the State is another unpublished Memorandum Decision where rehearing and rehearing en banc was denied and no cert petition has been filed to date (although the State could still do so). By listing its very few losses, the State comes across as a sore loser, but does nothing to advance its argument that the case at bar meets *any* of the standards for this Court to grant certiorari on an unpublished, non-precedential Memorandum Decision where the State simply wishes to reargue the facts. The only result of granting certiorari in this case would be to greatly increase the workload of the various Courts of Appeals by forcing them to write lengthier opinions in routine, unpublished cases, and of this Court by giving the State more chances to seek certiorari every time they lose. Of course, if that is required of the very few appellate cases that *grant* habeas relief, it must also be required of the infinitely greater number of appellate cases that *deny* habeas relief.

VI. CONCLUSION

For the foregoing reasons, Mr. Jackson respectfully asks this Court to deny this Petition for Writ of Certiorari.

Dated: January 13, 2011

Respectfully submitted,



MARK D. EIBERT
Counsel of record for Respondent
STEVEN FRANK JACKSON

---

545 U.S. 162 (2005); *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004).

APPENDIX A

UNPUBLISHED MEMORANDUM OPINION OF THE NINTH CIRCUIT COURT OF APPEALS

JULY 23, 2010

FILED

JUL 23 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN FRANK JACKSON, Petitioner - Appellant, v. T. FELKNER, Respondent - Appellee.	No. 09-15379 D.C. No. 2:07-cv-00555-RJB MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Robert J. Bryan, District Judge, Presiding

Argued and Submitted April 15, 2010
San Francisco, California

Before: SCHROEDER and RAWLINSON, Circuit Judges, and COLLINS, District Judge.**

Appellant Steven Frank Jackson (Jackson) appeals the district court's denial of his petition for a writ of habeas corpus, contending that the prosecutor's peremptory challenges excusing two African-American jurors violated his rights

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

under the Sixth and Fourteenth Amendments. Because Jackson filed his habeas petition after 1996, his claim is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Byrd v. Lewis*, 566 F.3d 855, 859 (9th Cir. 2009).

"Under AEDPA, [Jackson's] petition can be granted only if the state court determination resolving his claim was contrary to, or involved an unreasonable application of, clearly established Federal law . . ." *Id.* (citation and internal quotation marks omitted). It is clearly established federal law that the Equal Protection Clause prohibits the prosecutor from challenging prospective jurors solely on the basis of race. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see also Ali v. Hickman*, 584 F.3d 1174, 1180 (9th Cir. 2009), *as amended*. "A *Batson* challenge has three steps: first, the defendant must make a prima facie showing that a challenge was based on race; second, the prosecution must offer a race-neutral basis for the challenge; and third, the court must determine whether the defendant has shown purposeful discrimination." *Cook v. Lamarque*, 593 F.3d 810, 814 (9th Cir. 2010) (citations and internal quotation marks omitted). In evaluating pretext, our precedent requires a comparative juror analysis. *See Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005)).

The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors. *See Ali*, 584 F.3d at 1182 (holding under similar circumstances that the California Court of Appeal's finding of no pretext was unreasonable). Therefore, we reverse the district court's denial of Jackson's petition for writ of habeas corpus.

REVERSED and REMANDED.

APPENDIX B

NINTH CIRCUIT ORDER DENYING STATE'S PETITION FOR PANEL REHERAING AND REHEARING EN BANC SEPTEMBER 3, 2010

FILED

SEP 03 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN FRANK JACKSON, Petitioner - Appellant, v. T. FELKNER, Respondent - Appellee.	No. 09-15379 D.C. No. 2:07-cv-00555-RJB Eastern District of California, Sacramento ORDER

Before: SCHROEDER and RAWLINSON, Circuit Judges, and COLLINS, District Judge.*

The panel has voted to deny the Petition for Rehearing. Judges Schroeder and Rawlinson voted, and Judge Collins recommended, to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc, and no judge of the court has requested a vote.

Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc filed on August 4, 2010, is DENIED.

REPLY BRIEF

180 (3)

No. 10-797

Supreme Court, U.S.
FILED
JAN 25 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

T. FELKNER, *Petitioner*,

v.

STEVEN FRANK JACKSON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General
TAMI M. KRENZIN
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-2394
Fax: (916) 324-2960
Tami.Krenzin@doj.ca.gov
Counsel for Petitioner

COPY

TABLE OF AUTHORITIES

Page

CASES

Ali v. Hickman
584 F.3d 1174 (9th Cir. 2009) 4
Batson v. Kentucky
476 U.S. 79 (1986) 1, 3, 4
Harrington v. Richter
562 U.S. ___ (2011) 1, 2, 3, 5
Hernandez v. New York
500 U.S. 352 (1991) 3
Lockyer v. Andrade
538 U.S. 63 (2003) 3
Reynoso v. Hall
No. 08-15800, 2010 WL 3516410 (9th Cir. Sept. 7, 2010) 4
Rice v. Collins
546 U.S. 333 (2006) 5

STATUTES

Title 28, United States Code
§ 2254 1
§ 2254(d) ..... passim
§ 2254(d)(2) 2
§ 2254(e)(1) 2

REPLY BRIEF

Despite the tight limit on federal habeas relief imposed by the deferential review rule of 28 U.S.C. § 2254(d), the Ninth Circuit, without explaining why it believed its decision comported with that rule, overturned the state trial judge's credibility determination under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). It did this even after the state judge's determination had been affirmed by both the state court of appeal and the federal district court, and despite the fact that the race-neutral justifications offered by the prosecutor were directly supported by the record.

Instead, the Ninth Circuit concluded that purposeful discrimination existed simply because the prosecutor had challenged two of three prospective African-American jurors and because the record reflected different treatment of what it dubiously deemed to be "comparably situated jurors." The Ninth Circuit's ruling failed to address the state court's factual findings and failed to provide any basis for concluding that the state court had unreasonably determined them. Thus, the Ninth Circuit engaged again in "judicial disregard" of its obligation under § 2254 to presume the state court's fact-finding to be correct and to review it merely for objective reasonableness. This Court should grant certiorari, and certainly would be justified in summarily reversing, because the Ninth Circuit's decision conflicts with this Court's precedents prescribing deference to state courts under *Batson* and because it conflicts with § 2254(d)'s restrictions on federal courts as this Court again made clear just days ago in *Harrington* v. *Richter*, 562 U.S. ___ (2011).

1. The conclusory nature of the Ninth Circuit's opinion betrays its "judicial disregard" of § 2254(d). As this Court recently explained, § 2254(d) requires the federal habeas court to consider the arguments or theories that supported or *could have supported* the state court's decision. *Harrington* v. *Richter*, 562 U. S. ___, at ___ (slip op., at 12, 14) (emphasis added). Here, the state and federal jurists who previously considered respondent's claim, one in essence determined on a credibility call by the trial judge, all rejected it. The Ninth Circuit's sudden and cryptic reversal, in the face of repeated decisions rejecting respondent's claim, provides little basis for confidence that it adhered to the limits on its powers as set out in § 2254(d) and explained in *Richter*. As in *Richter*, there is no good reason to think that the Ninth Circuit's analysis would have been any different *without § 2254(d)*.

2. Respondent takes issue with the State's reliance on the state court's finding that the prosecutor had allowed a third African American to serve on the jury. But respondent has not shown that this factual finding by the state court was unreasonable under § 2254(d)(2). Nor has he presented clear and convincing evidence to rebut the presumption of correctness afforded the state court's factual finding under § 2254(e)(1). The State's reliance on this factual finding is therefore proper.

3. Respondent also argues that—even though the state court cited the underlying facts—the prosecutor did not expressly justify his challenge of Juror S on grounds that the juror had "a lot of baggage" with regard to the molestation of his niece and nephew and that the juror had hesitated and bit his lip when asked if he could be fair and impartial. But this Court has never "clearly established" that

such obvious reasons are out of bounds in the judge's assessment of whether a *Batson* "prima facie" case of racial discrimination has been shown. Instead, this Court in *Batson* explained that, "[i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." 476 U.S. at 96-97.

In any event, the district court certainly was entitled to consider such apparent facts in determining the "only question that matters" here: whether the state court reasonably determined that respondent had failed to meet his ultimate burden of proving racial discrimination under the totality of the circumstances. See *Hernandez* v. *New York*, 500 U.S. 352, 363 (1991) (a prosecutor's motive can be inferred from the totality of the circumstances); see also *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003). The record supported the state court's finding that the reasons the prosecutor specifically gave for excusing Mr. S were race-neutral, and the district court correctly found the state court's determination reasonable.

4 Respondent's arguments mistakenly proceed from a "de novo" rather than deferential consideration of his *Batson* claim. Under § 2254(d), however, the issue is not whether respondent or the Ninth Circuit believes that the state court correctly decided the *Batson* claim, but only whether the state court's findings were objectively unreasonable—meaning that no reasonable jurist could make the same factual determinations as the state court did and ultimately decide that no *Batson* violation occurred. See *Harrington* v. *Richter*, 562 U.S. ___, ___ (slip op., at 11-13) (under § 2254(d), federal habeas relief is precluded unless there is no possibility that "fairminded jurists could disagree" on the correctness

of the state court's decision or that the state court's decision conflicts with this Court's precedent).

It is futile to say that all reasonable jurists would have to conclude that other jurors, unchallenged by the prosecutor, were "similarly situated" with the two African-American jurors excluded from the panel. And, of course, the Ninth Circuit opinion contains no such assertion. A reasonable jurist easily could conclude that no other juror was similarly situated with Ms. J, who had a distinctive background in social work that was anathema to the prosecutor. And a reasonable jurist easily could conclude that no other juror was like Mr. S, who had reported experiencing years of repeated harassment by local law enforcement because of his race and age. This conclusion is supported by the record and is evidenced in the findings of both the state and federal courts—both of which fully engaged in "comparative juror analysis" and upheld the state judge's ruling in light of it.

5. Respondent's argument, that the Ninth Circuit's decision is unpublished and fact-specific, ignores the important and the recurring nature of the problem of misapplication of § 2254(d). This Court's many grants of certiorari in the past few Terms, and reversals of grants of relief under § 2254(d), attest to the importance of the issue.

Further, unwarranted grants of relief under *Batson* entail their own significant consequences. Even though § 2254(d) all but imposes a complete bar on federal relitigation of claims decided in state court, the Ninth Circuit recently has granted relief under *Batson* in this case and in two other cases based on its own comparison of jurors from a cold record. See *Ali* v. *Hickman*, 584 F.3d 1174 (9th Cir. 2009); *Reynoso* v. *Hall*, No. 08-15800, 2010 WL

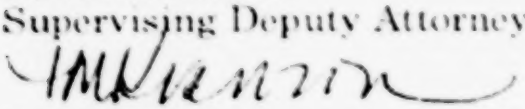
3516410 (9th Cir. Sept. 7, 2010) (Callahan, J., dissenting). Indeed, the Ninth Circuit also granted relief on similar erroneous grounds and was reversed by this Court in *Rice* v. *Collins*, 546 U.S. 333 (2006).

These reversals require retrials for crimes that occurred years before, forcing victims and their families to relive their past experiences and forcing prosecutors to obtain evidence that may not have been preserved. Here, a now 80-year-old rape victim will have to endure the retrial of a brutal rape. Such an intrusion into the state's criminal justice system is warranted only in extreme circumstances. See *Harrington* v. *Richter*, 562 U.S., at ___ (slip op., at 13) ("Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal.") (internal citation omitted). A grant of such an extraordinary remedy, after all of the judges considering the claim earlier had rejected respondent's claim, certainly warrants an explanation responsive to § 2254(d). The decision in this case, employing an unarticulated comparative juror analysis to trump the state court's credibility findings, threatens, if not invites, the kind of "judicial disregard" of § 2254(d) that this Court condemned in *Richter*.

For these reasons, and those set out in the Petition, this Court should grant a writ of certiorari.

Respectfully submitted

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General



TAMI M. KRENZIN
Deputy Attorney General
Counsel of Record
Counsel for Petitioner

January 25, 2011

SA2009310120
31184826.doc